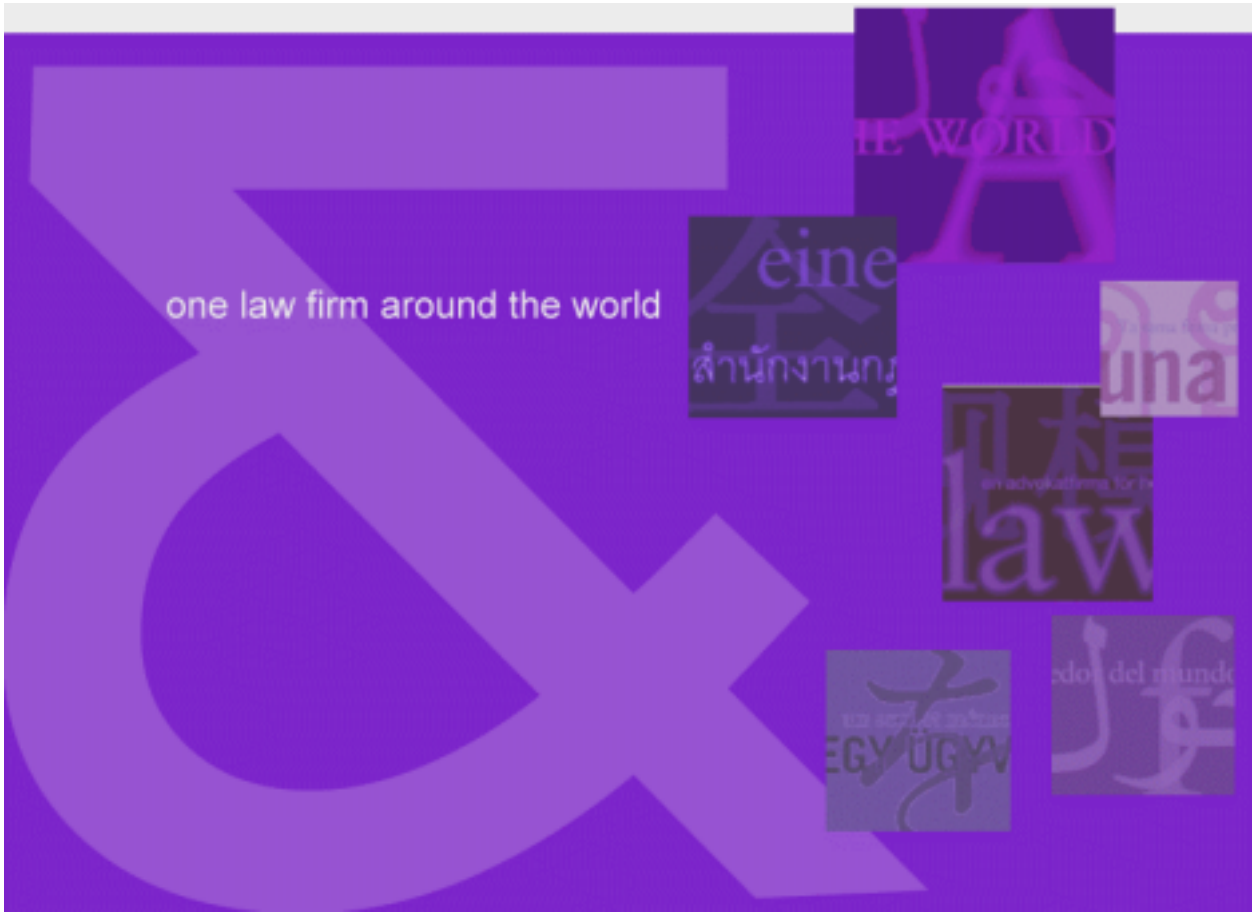
WHITE & CASE
LIMITED LIABILITY PARTNERSHIP

Japan External Trade Organization

WORLD TRADE ORGANIZATION & REGIONAL TRADE AGREEMENTS

November 2002



Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

TABLE OF CONTENTS

SUMMARY OF REPORTS

U.S. Perspectives on WTO

USTR Holds Public Hearing on GATS Negotiations Objectives

The office of the United States Trade Representative (USTR) held on November 6, public hearings concerning market access in services within the context of the WTO's Doha Development Agenda negotiations. The USTR sought comments on the content of the on-going services negotiations from witnesses present at the hearing who included industry and non-governmental organizations representatives and academics. The hearing provided the representatives the forum to set forth before USTR negotiating priorities and concerns related to their specific services sectors. Among those who presented testimonies before USTR were representatives from the Coalition of Services Industries (CSI), the Subcommittee of Air Courier Conference of America (ACCA), New York Life International (NYLI) and Friends of the Earth.

Doha Series Concludes with Panels on Subsidies, Dispute Settlement and Prospects for the Cancun Ministerial

The Global Business Dialogue ("GBD"), National Foreign Trade Council ("NFTC") and Washington International Trade Assosication ("WITA") on November 14, 2002, concluded their series on the WTO's Doha Development Agenda negotiations with a three-part presentation on the following issues:

- ***Subsidies*** – Discussion of the need for reform of SCM Agreement (subsidy) disciplines; perspectives from a private lawyer and country delegations.

- ***Dispute settlement reform*** – Status of WTO dispute settlement reform; perspectives from USTR, EC and Canada and Congressional staff member.

- ***Cancun Ministerial*** – Prospects for the Cancun Ministerial; perspectives from industry groups and country delegations.

Speakers were generally optimistic about the progress for Doha negotiations on issues including subsidies and dispute settlement reform. They expressed caution that difficult issues must be addressed at the Cancun Ministerial and support from developing countries will be essential to a successful outcome.

USTR Zoellick Outlines U.S. Doha Priorities to Congress

U.S. Trade Representative ("USTR") Robert Zoellick on November 4, 2002 notified to Congress the U.S. government's (seventeen specific) negotiating priorities under the auspices of the WTO in accordance with the Trade Act of 2002.[1] Zoellick directed his comments on

[1] Section 2106(b)(2)(A) of the Trade Act of 2002 requires regular and detailed briefings to Congress on U.S. trade policy objectives, including WTO negotiating objectives. USTR Zoellick notified U.S. WTO objectives on November 4, 2002, in letters to Robert Byrd, President Pro Tempore of the Senate and Dennis Hastert, Speaker of the House of Representatives.

the new round of negotiations launched at the Doha Ministerial, and stated that the US would pursue an ambitious liberalization agenda for agriculture, industrial market access, services and other negotiating objectives. He also highlighted U.S. priorities as defense of its trade remedy laws and ensuring dispute settlement procedures are more "transparent, effective and fair." Zoellick commented briefly on a stronger collaboration with Congress in the negotiating process, but is reportedly resistant towards an active role by Congress.

Washington Panel Discussion on Outcome of Sydney "Mini-Ministerial

Twenty-five WTO Members met at a "mini-ministerial" in Sydney, Australia from November 14-16, 2002, in order to move forward negotiations of the Doha Development Agenda. After the meeting, the Women in International Trade ("WIIT") on November 19 held a breakfast panel in Washington DC to discuss the outcome of the mini-ministerial. Speakers from country delegations cited progress on key issues of the Doha agenda (*e.g.* TRIPs Agreement on compulsory licensing/access to essential medicines), and placed special attention to the perspectives within the developing world. Panelists also raised the need to differentiate among the developing countries when setting deadlines for compliance with WTO obligations.

Although the Sydney meeting made progress on improving access to essential medicines and special and differential ("S&D") provisions for developing countries in WTO Agreements, much work is left prior to agreements on these two issues (which have deadlines of the end of 2002), and on other Doha agenda issues prior to the Cancun Ministerial in September 2003.

Leadership Changes in the 108th Congress: Prospects for Trade

Major trade items expected to top the trade agenda during the 108th Congress are the free trade agreements (FTAs) with Singapore and Chile and the FSC/ETI dispute. In addition, Committees likely will hold hearings on the FTAA and WTO negotiations, which both have proposed deadlines of 2005. The Congressional Oversight Group, which is composed of members of the House and Senate, will also be engaged in consultations with the United States Trade Representative regarding the long list of free trade agreements the US is set to launch, *i.e.*, Morocco, Central America, Australia, and Southern Africa.

Republican control of both the House and Senate will allow, Members willing, the Administration to dictate the trade agenda. Therefore, lack of floor time is not expected to hinder passage of the Singapore and Chile FTAs, which are expected to be concluded in December. The danger, however, exists that floor time for trade issues could be limited due to other Republican priorities.

Republican control of Congress will ease consideration of Republican initiatives, but control of the agenda does not ensure passage of Republican priorities. Analysts do not expect the Singapore and Chile FTAs to pass easily, even given the ability to provide adequate floor time in the House and Senate. Analysts fear that congressional debate on these FTAs will mirror the debate on TPA, thereby turning into a "TPA II" debate. In other words, Members of Congress essentially would ignore most of the provisions in the FTA and concentrate on what the Administration has negotiated on labor, environment, and investment. In the end, however, analysts expect Congress to approve the agreements.

The prospects for resolution of the FSC/ETI dispute appear slightly better with Grassley as the new Chairman of the Senate Finance Committee, but the outcome of the dispute remains unclear. Ways and Means Committee Chairman Bill Thomas (R-California) has taken a lead in trying to find a viable legislative solution to the dispute.

WTO Working Bodies

Progress on WTO Harmonization of Non-Preferential Rules of Origin Stalls in the Face of a Dispute on the Scope of the Agreement on Rules of Origin

Since the June 28, 2002 meeting of the WTO Committee on Rules of Origin (CRO), progress on the negotiations on the outstanding issues has stalled (*Please see the August 2002 WTO Report - "Work of WTO Harmonization of Non-Preferential Rules of Origin at Impasse Over Application of Trade Remedies"*). The General Council did not take up the report of the CRO Chairman during its October 2002 meeting. Rather, the General Council Secretary asked the CRO Chairman to conduct one-on-one, private negotiations with the CRO members to work towards consensus on the outstanding issues. These private meetings were conducted in November. The CRO Chairman's efforts did not succeed.

One issue in particular has bogged down progress towards consensus: the "implications of implementation" issue (*i.e.*, whether the harmonized rules should apply to other WTO Agreements). The United States and several other Members have argued that the Agreement on Rules of Origin does not require that Members use the harmonized rules of origins when implementing other WTO Agreements, while most Members believe that a plain reading of Article 1.2 of the Agreement on Rules of Origin mandates that Members apply the harmonized rules. Because the resolution of the "implications of implementation" issue will dictate the scope of the application of the Agreement on Rules of Origin, there likely will be no further progress on the harmonization work program unless the General Council can achieve consensus regarding this fundamental issue.

Because of the failure of the private negotiations, the General Council likely will take up the CRO Chairman's report at a future meeting. Consequently, the December 2002 deadline for completion of the harmonization work program most likely will not be met.

Cambodia Aims to Join the WTO by Cancún Ministerial

The Working Party on Cambodia's accession[2] to the WTO ("Cambodia WP") held its third meeting in Geneva on November 14, 2002. At the most recent session of the Cambodia WP, the WTO Secretariat has prepared and received the following accession instruments:

- Cambodia's customs tariff schedule for 2001;
- Offer on goods tariffs;
- Offer on specific commitments in services;

[2] Andrea Meloni (Italy) chairs the Working Party. The members of the Working Party are: Australia, Canada, China, European Communities and member states, India, Japan, Republic of Korea, Malaysia, New Zealand, Singapore, Chinese Taipei (Taiwan), Thailand, United States and Venezuela.

- List of domestic support and export subsidies in agriculture; and
- Various draft laws and rules, including on customs, copyright and insurance

Cambodian negotiators also undertook bilateral negotiations on the fringes of the Working Party in Geneva with the European Communities ("EC") and other Members. The WTO Accessions Division has scheduled a follow-up meeting in the spring of 2003, which is likely to be one of the last meetings before Cambodia's formal accession to the WTO. Analysts expect the final Working Party Report on the Cambodian accession to be completed by late March or early April. Cambodia hopes to join the WTO at or before the Fifth WTO Ministerial Conference in Cancún, September 10-14, 2003.

EC and Japan Submit Proposals on Industrial Market Access to the WTO

The European Communities ("EC") and Japan recently tabled new proposals in the context of WTO negotiations on market access for non-agricultural products. The EC proposal tabled on 31 October 2002 calls for a "compression mechanism" approach to lowering tariff rate bands on industrial goods and in order to reduce tariff peaks. The EC also suggests approaches to developing country concerns, including longer transition periods for liberalization and targeting products of interest to developing countries. This EC proposal was made to a meeting of the Negotiating Group on Market Access ("NGMA") held on 4-5 November 2002, and expands on its first proposal submitted in June 2002. Japan submission to the NGMA tabled on 5 November 2002, presents an ambitious plan for tariff reductions including a zero-for-zero harmonization approach for a wide range of goods not covered in the Uruguay Round.

Dispute Settlement Understanding

U.S. Department of Commerce Modifies the "Arm's Length" Test in Affiliated Party Transactions to Implement the WTO Appellate Body's Ruling in Hot-Rolled Steel Products from Japan

On November 15, 2002, the U.S. Department of Commerce (DOC) announced that it was modifying its practice regarding the determination of "arm's length" transactions between affiliated parties in antidumping proceedings. A WTO Dispute Panel and Appellate Body ruled in February 2001 and August 2001 respectively that the DOC's prior practice violated WTO requirements.

In particular, the Panel and the Appellate Body found that the DOC's prior practice had the effect of unfairly raising dumping margins for respondents in U.S. proceedings. The DOC will apply the modified practice to the underlying case (certain hot-rolled products from Japan), including the establishment of new cash deposit rates for all producers for whom the investigation rates are still applicable, with respect to unliquidated entries of the subject merchandise which are entered, or withdrawn from warehouse, for consumption on or after the date on which the United States Trade Representative (USTR) directs the DOC to implement that determination. The new test also will apply to future investigations and reviews initiated on or after November 23, 2002.

The effect of the new test will not become clear until the DOC applies the new standard to new investigations and reviews.

Proposals by Japan and Mexico in the Context of the Review of the WTO Dispute Settlement Understanding

Japan and Mexico have submitted new proposals for the revision of the WTO's dispute settlement system, in the context of the review of the Dispute Settlement Understanding ("DSU") which is to be completed by May 2003 for submission to the Fifth Ministerial Conference in Cancun, Mexico, in September 2003.

The main issues treated in the Mexican submission are:

- earlier Article 22.7 determinations of the level of nullification and impairment;
- retroactive application of compensation for nullification and impairment;
- provisional remedies for damage that would be difficult to repair during the course of the dispute settlement process either in the form of the suspension of the measure in question or authorization to allow the complaining Member to take actions to nullify the injurious effects of the measure in question; and
- negotiable remedies by which a Member that prevails in its challenge of another Member's WTO-inconsistent measures may trade for value its remedy (*e.g.*, authorization to suspend obligations) to a third Member that in turn would suspend its obligations against the Member found to have violated a WTO Agreement.

Japan's submission also focus on remedies:

- determinations of level of impairment or nullification that reflect the potential level of damage, rather that just the actual damage caused by the inconsistent measure;
- tougher remedies for abuses of "discretionary law";
- flexibility in the number of Appellate Body members; and increased public access to submission in DS proceedings.

Regional Trade Agreements

US and Australia Agree to Negotiate FTA

Yesterday, the United States Trade Representative (USTR) Robert Zoellick announced that the Administration has notified the U.S. Congress of its plans to launch free trade agreement (FTA) negotiations with Australia. Zoellick made the announcement in Canberra, Australia, after meeting with the Australian Prime Minister John Howard and the Trade Minister Mark Vaile. The negotiations are scheduled to begin in mid February.

Some agricultural businesses in the U.S. oppose the FTA and expressed "strong reservation against this course of action." They stressed that an FTA with Australia would bring "no net benefit" to the U.S. and would disadvantage U.S. agriculture producers.

USTR Briefs Business Community on U.S.-Singapore FTA

USTR officials at a recent meting indicated that one balance of payments ("BOP") issue with Singapore is a significant issue and it could block conclusion of the U.S.-Singapore Free Trade Agreement (FTA). Singapore has asked for an exception in the free transfers article of the FTA investment chapter. Singapore wants to maintain the right to impose controls on capital accounts and current account transactions in times of economic crises.

The U.S. business community remains divided on the issue. Some representatives argue that it is essential the FTA ensure that Singapore does not restrict capital outflows in times of economic crises because of the precedent the U.S.-Singapore FTA could set for future FTAs.

Other representatives argue that currently Singapore has the right to restrict capital outflows and the failure to conclude an FTA will not change the situation.

US Hopes to Conclude FTA with Chile Despite Outstanding Issues; Chile Signals It Will Only Sign an Agreement It Deems Beneficial

The Chilean Government is moving forward with its trade policy to conclude free trade agreements (FTAs) with its most important trade partners, the European Union (EU), the United States, and Japan. On November 18, 2002, Chile signed an FTA with the EU. Analysts expect the negotiations for the U.S.-Chile FTA to be concluded before the end of this year, possibly in the current round already underway in Washington. Despite these positive predictions, officials admit that numerous outstanding issues remain to be resolved.

The only major trade partner with which Chile has not been able to launch FTA negotiations is Japan, as the Japanese Government has not yet expressed its willingness in this regard.

Conference Explores Benefits of FTAA and Feasibility of 2005 Deadline

Speakers at a recent conference regarding the Free Trade Area of the Americas (FTAA) were optimistic that the FTAA countries would conclude an agreement by 2005, but questioned what type of agreement would emerge. Analysts have speculated that negotiators will not be able to conclude an ambitious agreement by 2005 and, therefore, would agree to a scaled down version. Other analysts have suggested that the failure of the US and Brazil to agree on sensitive sectors could result in a web of bilateral and regional agreements instead of a hemisphere-wide FTAA.

Panelists at the recent conference reviewed the benefits expected from the FTAA. Latin American and Caribbean countries, among other things, would secure market access provisions currently renewable through U.S. preference programs and further open the U.S. market.

An important issue is how the FTAA will affect the existing bilateral and regional agreements. Clearly Mercosur and other regional groups will have to define their purpose and value in light of a hemisphere wide agreement that, presumably, will go further to liberalize markets.

One suggestion raised at the conference is that these regional groups could define their role in the region in terms of "neighborhood issues," such as border issues, that would not be included in the FTAA.

Discussion of US-Taiwan FTA Prospects

The New America Foundation sponsored a discussion on November 22, 2002 on the prospects for a free trade agreement ("FTA") between the US and Taiwan. Chief International Trade Counsel of the Senate Finance Committee Greg Mastel commented favorably on the prospects of an FTA with Taiwan, and about FTAs as generally a more effective and timely approach at trade liberalization than WTO negotiations. Audience participants, however, were generally more skeptical and cited economic and political reasons why an FTA would not be launched in the near future. Mastel requested that his remarks (which are somewhat controversial) be considered **off-the-record**.

WTO Committee on Regional Trade Agreements Issues 2002 Draft Report

The WTO's Committee on Regional Trade Agreements has issued the 2002 Draft Report of its activities to the General Council. Despite the fact that the Committee has completed the factual examination of most of the active and notified regional trade agreements ("RTAs"), the persistent lack of consensus among Members has blocked the adoption of a final decision on the WTO-compliant status of relevant RTAs.

The Committee's report confirms, once again, the need to clarify and improve the current disciplines and procedures applying to RTAs. Negotiations are taking place on this issue as part of the Doha Round, but with little progress to date. The European Community, as one of the most active Members concluding RTAs, is expected to play a key role in the on-going negotiations.

REPORTS IN DETAIL

U.S. PERSPECTIVES ON WTO

USTR Holds Public Hearing on GATS Negotiations Objectives

SUMMARY

The office of the United States Trade Representative (USTR) held on November 6, public hearings concerning market access in services within the context of the WTO's Doha Development Agenda negotiations. The USTR sought comments on the content of the on-going services negotiations from witnesses present at the hearing who included industry and non-governmental organizations representatives and academics. The hearing provided the representatives the forum to set forth before USTR negotiating priorities and concerns related to their specific services sectors. Among those who presented testimonies before USTR were representatives from the Coalition of Services Industries (CSI), the Subcommittee of Air Courier Conference of America (ACCA), New York Life International (NYLI) and Friends of the Earth.

ANALYSIS

I. USTR Hearing on GATS Negotiations Objectives

The hearing was conducted by the Trade Policy Staff Committee (TPSC), an interagency body chaired by the Office of the USTR. The TPSC outlined topics for negotiating objectives relating to services as including:

- Removal or reduction of barriers to U.S. services exports under existing GATS disciplines;
- Establishment of new GATS disciplines to ensure effective market access (e.g., proposed disciplines on domestic regulations in services, possibly addressing transparency and necessity); and
- Clarification of sectoral definitions in the GATS

USTR officials present at the meeting included those directly involved in the services negotiations. Additionally, representatives from the Departments of Commerce, Transportation, Labor, the Environmental Protection Agency and the US International Trade Commission were also present. Witnesses included industry representatives and academics. We provide below an account of the testimonies presented before TPSC by the various witnesses:

II. David Spence, Senior Counsel Federal Express and Chairman, International Trade Subcommittee of Air Courier Conference of America (ACCA)

Speaking on behalf of ACCA, David Spence outlined the objectives of the express delivery services industry for the GATS negotiations. ACCA's testimony focused on the need to:

- Prohibit cross subsidization by national postal administrations from their monopoly profits to their express delivery services. Spence emphasized that the prohibition of cross-subsidization was one of ACCA's most critical objectives and one that the US government had not yet addressed. ACCA currently faces postal administration in key markets that cross-subsidize their express delivery services. ACCA considers this to constitute an unfair competitive advantage that directly limits the market access of otherwise competitive private companies.

- Define "Express Delivery Services" to include the full scope of services provided. Spence explained that the current GATS classification inaccurately defines express delivery services as being part of courier services. Moreover, the services provided by national postal administrations, although identical to the services provided by express delivery operators, were not included under courier services. ACCA considers this classification as establishing an artificial distinction based on the provider of the service and therefore extending a competitive edge to postal administrations vis-à-vis express operators. ACCA calls for a narrowly tailored reservation on postal services, stating clearly that the reservation does not apply to express delivery services.

- Seek specific-commitments on express delivery related services including ground transportation, warehousing, customs brokering, inventory management, telecommunication, and other logistics-related services. Spence emphasized the need for commitments in these related services, given that barriers in any of these areas could affect the efficient supply of express delivery services. Reservations on these services should be narrowly drawn and should specify that they do not apply to express delivery services. Additionally, the express delivery industry seeks commitments in the burgeoning area of e-commerce, which allows express operators to create business-to-business links, extend information services to customers, and provide door-to-door shipment on a time sensitive basis.

- Include in each negotiated agreement with other WTO members, trade facilitation provisions that expedite treatment of express delivery shipments.

The Panel asked Spence to elaborate on the difference between express delivery and courier services. Spence explained that courier services as classified in the GATS classification list did not cover the full range of services activities constituted under express delivery services.

Express Delivery covered a range of activities from pick-up to tracking and tracing to administration, which a courier service (like a bicycle messenger) would not necessarily cover.

In light of ACCA's proposal to create GATS disciplines to address cross-subsidization of express operators by postal services, the ***Panel*** asked Spence how express delivery services should be considered unique vis-à-vis other sectors. Spence replied that express operators were in a unique situation because they had to compete with government monopolies that breached market rules by cross-subsidizing their express delivery services. Cross-subsidization would push prices down to the extent that private competitive companies would be driven out of the market.

III. David Waskow, International Policy Analyst and Trade Policy Coordinator, Friends of the Earth

Waskow voiced concern over the implications of the services negotiations for domestic regulations to protect consumer health and safety and the environment. He stated that over two-thirds of all services trade occurred in sectors with substantial environmental impacts and proposed, on behalf of the Friends of the Earth (FOE), the following measures:

- Undertake a social assessment: The US and other WTO members should conduct a thorough and comprehensive assessment of the environmental, social and developmental implications of services trade liberalization under the GATS. Members should conduct such assessments before continuing with any request-offer negotiations.

- Improve transparency: Given the potential impact of GATS commitments on consumer health and the environment, the WTO and its members should make all requests and offers available to the public.

- Provide for a GATS environmental exception: An environmental exception comparable to GATT Article XX(g) for measures "relating to the conservation of exhaustible natural resources" should be included in the GATS. The US should also take immediate action in this regard by urging all WTO members to include in their national commitments a horizontal condition identical to the exception in Article XX(g) and Article XX(b) of the GATT. The US offers should also explicitly include such a horizontal condition.

- Refrain from disciplines on domestic regulations: No further disciplines should be negotiated within the context of Article VI.4 of the GATS (measures relating to qualification and licensing requirements, and technical standards.)[3].

[3] GATS Article VI:4 reads:

- Exempt natural resource activities: Natural resource extractive activities and any measures affecting such extractive activities should be explicitly excluded from coverage under the GATS, including any request/offer negotiations.

- Clarify exception on government services: The coverage of the existing exception under GATS Article I for "services supplied in the exercise of governmental authority" should be clarified.

- Exclude environmentally-harmful services: The scope of the environmental services negotiations should be redefined to exclude environmentally harmful services (or those whose impact is uncertain) while including those that are clearly beneficial to the environment.

The ***Panel*** (Peter Collins, Deputy Assistant USTR for Services) asked Waskow to elaborate on the assertion in FOE's testimony that an elaboration of transparency requirements under Article VI:4 could constrain local, state and federal environmental regulatory action and impede democratic processes. Waskow explained that a requirement for federal or sub-federal governments to enter into consultation with foreign governments would limit the former's ability to take needed environmental or other legitimate action.

In regard to environmental services, the ***Panel*** asked Waskow to explain how FOE perceived the current GATS classification as being limited. The Panel further asked for FOE's perspective on how it saw the request-offer approach as working towards including a wider array of sub-sectors. Waskow referred the Panel to the section in FOE's testimony that explained that the current classification primarily includes services sectors that did not provide clear environmental or consumer health and safety benefits. In fact, many involved activities (e.g. garbage incineration, oceanic or riverine dumping among others) that were environmentally harmful. The classified services were exclusively "end-of-pipe" services that did not involve preventive environmental activities in line with the Doha mandate.

With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:

(a) based on objective and transparent criteria, such as competence and the ability to supply the service;

(b) not more burdensome than necessary to ensure the quality of the service;

(c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

IV. Linda Schmid, Vice-President, Coalition of Services Industries (CSI)

Linda Schmid submitted to USTR on behalf of CSI a compendium of services priorities for the ongoing Doha Round, negotiations with countries acceding to the WTO, for bilateral agreements, and for use in trade forums such as APEC. The compendium is intended as a ready reference to the liberalization priorities of the many sectors represented in CSI's membership. Schmid highlighted priorities for telecommunications, financial, advertising, audiovisual, computer and related, education, express delivery, energy, environmental, legal, maritime and tourism services. She also identified priorities for improving cross-cutting issues including transparency, temporary entry of natural persons, electronic commerce, and acquired rights.

CSI's testimony strongly advocated strengthening GATS rules on transparency for all sectors. Moreover it proposes that these general rules be supplemented by additional and/or special rules to govern particular sectors. These additional transparency requirements for particular sectors could be set out through sectoral agreements or scheduling.

The ***Panel*** asked Schmidt to provide examples of services sectors represented in CSI's membership where such additional transparency requirements could be applicable. Schmidt identified financial services as being one such sector.

She referred the Panel to the model schedule for insurance that CSI had submitted as part of the compendium. The model schedule identifies commitments on regulatory transparency and other areas of regulatory best practice together with those on market access and national treatment in the four modes of supply. The model schedule sets out provisions on regulatory transparency that fall under "Best Practices in Insurance" which takes the form of additional commitments under GATS Article XVII. Besides transparency, this category covers other aspects of domestic regulation, like solvency and prudential issues, regulation of monopolies, and independent regulatory authority that are not addressed by the market access or national treatment provisions. The existence of such aspects of domestic regulation as "additional commitments" should lend greater specificity and predictability to the commitments that members undertake in their schedules.

Schmidt identified energy services as another sector where transparency in the formulation, promulgation and implementation of rules, regulations, licenses, technical standards, and arbitration and judicial review should be considered particularly important.

The ***Panel*** asked Schmidt to elaborate upon the nature of the special visa for the temporary movement of natural persons that she had referred to in her testimony. Schmidt explained the CSI had proposed that WTO members provide for the entry of key business personnel such as managers and highly- skilled technicians through a special visa that:

- Allows for expeditious processing and entry to perform temporary work assignments; and

- Covers both intra-corporate movement and work for clients or customers in another country where there is no affiliate office of the parent company

V. Ray Sander, Vice President, New York Life International (NYLI)

Sander emphasized the role of transparent regulatory regimes in achieving open markets for trade in services. He also stressed the importance of technical assistance and capacity building towards achieving more transparent regimes in developing countries.

The Panel asked Sander if NYLI had been involved with the provision of technical assistance in any developing country. Sander replied that NYLI had worked on several technical assistance projects in co-operation with the World Bank. He also said that NYLI had been working with the Ministry of Finance in Vietnam with the aim of helping them establish reliable regulatory regimes.

The Panel asked Sander to elaborate on how NYLI factored in the importance of regulation into their investment decisions, given its impact on consumers and national economies. Sanders explained that NYLI collaborated with state regulators to ensure the strength and reliability of regulations. In particular, NYLI worked closely with the International Association of Insurance Supervisors (IAIS)[4], which is one the organizations recognized that the World Bank collaborates with in assessing the reliability of regulatory regimes.

VI. Laurel Terry, Professor, Dickinson School of Law

In her testimony to the TPSC, Laurel Terry expressed concern on the inadequacy of the consultation process for legal services in the United States. Few US legal organizations and lawyers were fully involved in the consultations process and few understood the implications of the ongoing services negotiations for market access in legal services. She called for a more active role for USTR in launching a broader consultation process among lawyers, bar associations and other entities in the US concerned with legal affairs.

The ***Panel*** Members took note of Ms. Terry's recommendations and conferred with her on how to initiate a broader consultation process with the US legal system.

OUTLOOK

The United States submitted its initial requests for specific commitments on July 1, 2002 for a wide range of sectors and for almost all WTO Members. USTR indicated at the hearing that the US was close to submitting its initial offer on trade in services to WTO Members, which has an initial deadline of March 2003. Furthermore, the US government is continuing its consultation process with industry and other interested parties since it anticipates GATS negotiations, and Doha Development Agenda negotiations, to last until at least 2005, if not

[4] IAIS, in collaboration with the International Monetary Fund (IMF) and World Bank assesses how norms and standards are respected, verifies Insurance Core Principles, while, at the same time, creating the methodology in this field, and develops and distributes the comprehensive self-assessment questionnaire for adaptation to Insurance Core Principles, which will be used by members of the Association to assess their own potential, the structure of state institutions and their effectiveness. IAIS is compiling a list of qualified insurance experts involved in assessing how the standards are respected.

beyond. Thus, despite the good level of progress is GATS negotiations, improved services commitments will depend on the success of the overall "single undertaking" of negotiations in other sectors and issues.

Doha Series Concludes with Panels on Subsidies, Dispute Settlement and Prospects for the Cancun Ministerial

SUMMARY

The Global Business Dialogue ("GBD"), National Foreign Trade Council ("NFTC") and Washington International Trade Assosication ("WITA") on November 14, 2002, concluded their series on the WTO's Doha Development Agenda negotiations with a three-part presentation on the following issues:

- ***Subsidies*** – Discussion of the need for reform of SCM Agreement (subsidy) disciplines; perspectives from a private lawyer and country delegations.
- ***Dispute settlement reform*** – Status of WTO dispute settlement reform; perspectives from USTR, EC and Canada and Congressional staff member.
- ***Cancun Ministerial*** – Prospects for the Cancun Ministerial; perspectives from industry groups and country delegations.

Speakers were generally optimistic about the progress for Doha negotiations on issues including subsidies and dispute settlement reform. They expressed caution that difficult issues must be addressed at the Cancun Ministerial and support from developing countries will be essential to a successful outcome. We discuss in further detail the panel on subsidies.

ANALYSIS

I. Panel on Subsidies

Panelists discussed WTO subsidy disciplines and suggested areas for reform in the context of negotiations of the SCM Agreement.

A. Gary Horlick of Wilmer, Cutler and Pickering

Gary Horlick, a partner at the law firm of Wilmer, Cutler and Pickering provided historical background on the negotiations of the SCM Agreement, describing how existing rules only discipline a small subset of subsidies. These subsidies include export subsidies and those defined by the "peace clause" which is set to expire. Horlick believes that the Uruguay Round, however, has not established effective disciplines on many subsidies, which could be trade distorting – including non-specific and non-actionable subsidies. He asserted that questionable "amber" subsidies are a "great failure" of WTO rules as they have been rarely challenged, but are prevalent and often trade distorting.

As for future negotiations, Horlick cited the need to address underlying market distortions, at home and abroad. He noted, for example, that the US does not have a wide notification system for domestic subsidies (compared with the EU). In one example of market distortion, local governments in the past have issued municipal bonds whose interest spread was

subsidized, and made huge profits for local governments. Thus, he concluded that the next SCM negotiations should result in stronger disciplines on market-distorting subsidies.

B. Brazilian Ambassador Rubens Barbosa

Ambassador Rubens of Brazil explained that Brazil fought for the revision of the SCM Agreement since it believes the Agreement could help developing country priorities, including on export financing. He also referred to current negotiations on special and differential ("S&D") treatment to developing countries including on SCM provisions and the mandate to "review, clarify and strengthen" the Agreement.

Rubens cited four provisions of particular relevance to Brazil:

(i) Article 8 – Non-actionable subsidies, including those provided for research activities; disadvantaged regions; and new environmental requirements.

(ii) Article 11 – Investigation procedures to determine the existence of a subsidy.

(iii) Article 27 – Special and differential treatment for developing countries, in order to address their specific needs.

(iv) Annex I – Illustrative list of export subsidies. In particular, paragraph (k) on financing exports in a competitive manner.

Regarding Annex I(k), Rubens cited this as the root of the dispute between Brazil and Canada on financing of Embraer and Bombardier, respectively. He cited the need to consider export credits. He also discussed Brazil's proposal on export credits submitted to the WTO.

Rubens concluded by saying that Brazil considers essential the negotiations on WTO rules including subsidies and antidumping, as well as agriculture negotiations. Without progress in these areas, Brazil will not support conclusion of a new round. Similarly, he cited problems with the FTAA as the US does not want to address systemic issues including subsidies and antidumping provisions at the regional level. He warned that this position will make things more difficult as the 2005 deadline approaches and especially if there is little progress at the WTO.

C. Petros Sourmelis of the EU Delegation

Petros Sourmelis of the EC Delegation explained that the SCM Agreement introduced important concepts and disciplines on subsidies. For example, the very definition of a subsidy was established; rules on actionable subsidies; transparency provisions and S&D treatment.

Sourmelis stated that the EU was preparing its submission on subsidies negotiations and hopes to finalize the proposal "very soon." As an illustration of issues, he stated:

- ***Strengthen CVD provisions*** – Follow an approach more similar to the antidumping agreement on improving disclosure and non-confidential summaries;

- ***CVD remedy/action*** – Remedies should be taken only to the extent to cover the injury margin;

- ***Public interest test*** – Supplementary conditions and criteria in determining the public interest prior to initiation;

- ***Initiation*** – More effective procedures on initiation to ensure avoiding harassment;

- ***Costs of investigation*** – Reduce and simply investigation costs;

- ***Export financing*** – Clarification of provisions on export financing, perhaps by extending OECD rules to serve as benchmarks, *e.g*., OECD rules as a "safe harbor" for export credits; and

- ***Transparency*** – Improve compliance with notification mechanisms to inform WTO Members of the broadest possible scope of measures.

OUTLOOK

The Doha series panelists were generally optimistic about the status of negotiations, including for subsidies, dispute settlement reform and preparations for the Cancun Ministerial. Nevertheless, issues such as subsidies are often politically sensitive for both developing and developed countries as disciplines remain weak on non-actionable, but questionable amber subsidies – which are often trade distorting. Moreover, developing countries are keen to gain more favorable treatment in their use of subsidies. Nevertheless, the EC and others intend to issue comprehensive proposals on the SCM Agreement that seek to clarify initiation procedures, remedies and encourage greater transparency.

USTR Zoellick Outlines U.S. Doha Priorities to Congress

SUMMARY

U.S. Trade Representative ("USTR") Robert Zoellick on November 4, 2002 notified to Congress the U.S. government's (seventeen specific) negotiating priorities under the auspices of the WTO in accordance with the Trade Act of 2002.[5] Zoellick directed his comments on the new round of negotiations launched at the Doha Ministerial, and stated that the US would pursue an ambitious liberalization agenda for agriculture, industrial market access, services and other negotiating objectives. He also highlighted U.S. priorities as defense of its trade remedy laws and ensuring dispute settlement procedures are more "transparent, effective and fair." Zoellick commented briefly on a stronger collaboration with Congress in the negotiating process, but is reportedly resistant towards an active role by Congress.

ANALYSIS

I. Background

USTR Zoellick letter to Congress on November 4, 2002 began by emphasizing that with the passage of Trade Promotion Authority ("TPA") in August, the US is "again prepared to lead the world toward a more open, global marketplace." He emphasized that the U.S. would pursue an ambitious liberalization agenda for sectoral negotiations on agriculture, goods and services as well as other trade-related matters including e-commerce, trade facilitation, government procurement, transparency and other issues. Nevertheless, he cited that the US would take a more defensive position to preserve its trade remedy laws and disciplines.

The Trade Act of 2002 provides for a greater role for Congress in the negotiating process, but Congress' role has not yet been clearly defined. Zoellick pointed out that USTR has worked in close consultation with Congress to table substantial proposals on services and agriculture, transparency, and compulsory licensing of pharmaceutical products. (USTR also consulted Congress prior to release of the proposals on antidumping and industrial market access negotiations.) Notwithstanding, USTR Zoellick is reportedly resistant to an active oversight role by Congress – including efforts by Congress to participate directly in negotiations.

II. USTR Negotiating Priorities at the WTO

USTR Zoellick provided a summary of seventeen specific U.S. negotiating objectives, as follows:

[5] Section 2106(b)(2)(A) of the Trade Act of 2002 requires regular and detailed briefings to Congress on U.S. trade policy objectives, including WTO negotiating objectives. USTR Zoellick notified U.S. WTO objectives on November 4, 2002, in letters to Robert Byrd, President Pro Tempore of the Senate and Dennis Hastert, Speaker of the House of Representatives.

- ***Agriculture*** – Reduce, or eliminate tariffs, export subsidies, trade-distorting domestic support. Stronger disciplines on state trading enterprises and administration of tariff-rate quotas.

- ***Industrial goods*** – Reduce, or eliminate tariff and non-tariff barriers. Greater participation in sectoral agreements (*e.g.* Information Technology Agreement), and improve market access for textiles and civil aircraft exports (*e.g.* Agreement on Trade in Civil Aircraft).

- ***Services*** – Further commitments in "virtually all services" and across all four GATS modes. Also, new disciplines to promote transparency in regulation.

- ***Intellectual property/public health*** – Implementation of TRIPs and compulsory licensing provisions in consistency with the Declaration on TRIPs and Public Health. Stronger enforcement of IP rights and in relation to use of trademarks and geographical indications.

- ***Electronic commerce*** – Endorse principles on e-commerce (presented in late October 2002) to ensure non-discrimination of products and services delivered electronically. Prohibit application of customs duties on electronic transmissions.

- ***Trade facilitation*** – New and strengthened rules to facilitate trade through more transparent and efficient customs operations. Reduce costs and administrative burdens, facilitate regulatory efficiency and complete harmonization of non-preferential rules of origin.

- ***Trade and investment*** – Regarding investment, seek to establish rules that provide transparency in investment regimes. Ensure U.S. investments receive non-discriminatory treatment and address unjustified barriers to establishment and operation of U.S. investments.

- ***Government procurement*** – Additional agreement on transparency to prevent corruption and establish minimum requirements for government procurement regimes. Revise the Agreement on Government Procurement (GPA), expand range of products and government entities and encourage additional Members to join the GPA.

- ***Competition policy*** – Ensure work on trade and competition policy further develops "culture of competition" among WTO Members (*e.g.* peer review process to promote effective antitrust policies). Ensure work does not undermine U.S. antitrust laws.

- ***Transparency/regulatory reform –*** Promote transparency across a broad range of subjects, including rules on "timely and meaningful" public comment prior to issuance of trade-related measures.

- ***Labor*** – Expand cooperation between the WTO and ILO to promote policy coherence. Promote respect for worker rights and rights of children consistent with ILO core labor standards.

- ***Regional trade agreements*** – Seek to "clarify and improve" WTO rules on RTAs and procedures for reviewing compliance of RTAs with WTO rules.

- ***Environment*** – Ensure WTO negotiations reflect sustainable development by considering environmental implications of proposed agreements. Encourage cooperation between WTO and secretariats of multilateral environmental agreements (MEAs). Seek increased market access for environmental goods and services.

- ***Fishery subsidies*** – "Clarify and improve" disciplines to address environmentally harmful subsidies.

- ***Border taxes*** – Seek revision of WTO rules on border adjustment for internal taxes so that indirect and direct taxes are treated similarly.

- ***Trade remedy laws*** – Preserve ability to "enforce rigorously" U.S. trade remedy laws on antidumping, countervailing duty and safeguards. Address market distortions that lead to dumping and subsidization. Regarding antidumping and CVD proceedings, "clarify and improve" disciplines to bring standards in other WTO Members on due process and transparency to the level of U.S. standards, and prevent abuse of laws. Regarding subsidies, strengthen rules and calculation methodologies in the SCM Agreement. Also, more effective disciplines and greater transparency concerning civil aircraft subsidies.

- ***Dispute settlement*** – Modify Dispute Settlement Understanding (DSU) rules to make the system more "transparent, effective and fair." Ensure WTO bodies resolve disputes based solely on "those rights and obligations to which the parties have agreed" (*i.e.* standard of review).

OUTLOOK

USTR Zoellick's first notification to Congress on WTO negotiating priorities highlighted the government's strong desire to renew U.S. leadership in WTO negotiations, especially after the passage of TPA authority. Although TPA renewal and ambitious U.S. proposals are positive steps, the US faces criticism from some WTO Members as not going far enough in addressing sensitive issues including agriculture liberalization, trade remedy laws and certain developing country concerns.

Furthermore, the Trade Act of 2002 – while renewing TPA, contains provisions that could potentially hamper U.S. negotiating objectives. Some Members of Congress, including former Finance Chairman Senator Max Baucus seek a greater role in shaping trade policy, including through consultation, review of negotiating procedures and participation in negotiations. Incoming Chairman Senator Charles Grassley and House Ways and Means Chair Bill Thomas are known to be more accommodating on the matter. USTR Zoellick and others in the Administration are reportedly resistant to an intrusive oversight role by Congress, but are required by the Trade Act of 2002 to deliver guidelines on consultation procedures by December 6, 2002. In any case, U.S. trade policy formulation, including for post-Doha negotiations, will become a more complex process.

Washington Panel Discussion on Outcome of Sydney "Mini-Ministerial

Twenty-five WTO Members met at a "mini-ministerial" in Sydney, Australia from November 14-16, 2002, in order to move forward negotiations of the Doha Development Agenda. After the meeting, the Women in International Trade ("WIIT") on November 19 held a breakfast panel in Washington DC to discuss the outcome of the mini-ministerial. Speakers from country delegations cited progress on key issues of the Doha agenda (*e.g.* TRIPs Agreement on compulsory licensing/access to essential medicines), and placed special attention to the perspectives within the developing world. Panelists also raised the need to differentiate among the developing countries when setting deadlines for compliance with WTO obligations.

Although the Sydney meeting made progress on improving access to essential medicines and special and differential ("S&D") provisions for developing countries in WTO Agreements, much work is left prior to agreements on these two issues (which have deadlines of the end of 2002), and on other Doha agenda issues prior to the Cancun Ministerial in September 2003.

ANALYSIS

I. Background

Twenty-five WTO Members met at a "mini-ministerial" in Sydney, Australia from November 14-16, 2002, in order to move forward negotiations of the Doha Development Agenda. The agenda of the mini-ministerial focused on (i) compulsory licensing provisions of the TRIPs Agreement in the context of the Doha Declaration on TRIPs and Public Health; (ii) operation of special and differential ("S&D") treatment provisions in existing WTO Agreements; and (iii) other issues in preparation for the Cancun Ministerial Conference, to be held September 10-14, 2002.

The Women in International Trade ("WIIT") on November 19 held a breakfast panel in Washington DC to discuss the outcome of the Sydney mini-ministerial. Speakers from country delegations cited progress on key issues of the Doha agenda (*e.g.* TRIPs Agreement on compulsory licensing/access to essential medicines), and placed special attention to the perspectives within the developing world. Panelists also raised the need to differentiate among the developing countries when setting deadlines for compliance with WTO obligations.

II. Panelist Discussion: Progress Made in Sydney Despite Final Deal

A. Australian Embassy Views

Mr. McCarthy concluded that the Sydney meeting had made good progress on certain issues, and especially on moving toward an agreement to improve access to essential medicines. He expressed confidence that work on TRIPs compulsory licensing provisions would be completed by the scheduled deadline at the end of the year. Nevertheless, he emphasized that several critical issues remained unsolved, such as setting deadlines for agriculture and market access negotiations, non-trade issues and industrial market access. Therefore, the upcoming preparations for the Cancun Ministerial will be critical.

B. Brazilian Embassy Views

A commercial counsellor from the Brazilian Embassy said that Brazil's top priority is improving agricultural market access and asserted that previous agreements on agriculture have produced few results. He cited the U.S. Farm Bill and the recent EU Chirac-Schroeder pact on subsidies to agriculture as measures that go against the liberalization of trade in agriculture, despite the Doha negotiating mandate. He pleaded that the EU and US should implement subsidies and agricultural export credits in a manner to allow for more fair competition. He added that Brazil is willing to implement its WTO obligations on agriculture and subsidies, but GATT/WTO rules should be reviewed to take account of developing country concerns. Thus, he emphasized the need for realization of special and differential treatment for developing countries in agriculture, at the very least.

The representative further stated that Brazil is not against anti-dumping measures, but that disciplines on these measures should be clarified in order to prevent abuses.

C. Former World Bank/WTO Official on Developing Countries

Mr. Michalopoulos, a developing country specialist formerly with the World Bank, expressed concerns about certain issues that woul obstruct the realization of a successful conclusion of post-Doha negotiations. He named agriculture as a crucial issue, and stated that he shared Brazil's opinion on its importance to developing and other countries. He added that solving this matter would help move negotiations forward on other Doha agenda issues. He also shared Brazil's view on anti-dumping rules, and supported the need for more differentiation amongst the developing countries.

OUTLOOK

Panelists highlighted the progress made by Ministers in Sydney on the issue of compulsory licensing and public health. Nevertheless, outstanding issues remain including the types of generic drugs (and for which diseases/epidemics) that could be produced and imported by developing countries, and which countries would qualify to invoke compulsory licensing provisions (*e.g*. the right to self declare).

The US, Canada and Switzerland have been typically resistant to a broad interpretation of TRIPs provisions as their domestic pharmaceutical industries fear erosion of intellectual property rights through abuse of TRIPs, or through unauthorized trans-shipments of generic drugs. Major developing countries that have capacity to produce generic drugs, including India, Brazil and China are pushing for a more liberal interpretation of compulsory licensing provisions for a wider range of pharmaceuticals. Even highly-developing countries like South Korea, Hong Kong, China; and Singapore would like to reserve the right to produce generic drugs in the event of unexpected outbreaks of disease or attacks of bio-terrorism.

Currently, countries are still grappling with when and how to amend TRIPs Article 31(f) on compulsory licensing ("predominantly for the domestic market") to allow developing

countries to import generic drugs under patent. The US and others countries are moving towards agreement on a waiver provision, with the intent to amend Article 31(f) at a later date.

On the issue of special and differential treatment, Ministers in Sydney indicated they would accept a more pragmatic, staged approach to realizing S&D provisions rather than resolving over 80 outstanding issues by deadline at the end of the year. Developing countries also resisted efforts by the US and EU to differentiate developing countries that would be entitled to S&D provisions, and to move the S&D deadlines to the Cancun Ministerial. Nevertheless, no major decisions were reached on which key S&D provisions would be staged in first and which would be dealt at a later date.

Overall, the mini ministerial demonstrated that key issues of importance to developing countries on TRIPs/compulsory licensing and S&D provisions remain unresolved prior to the deadline of the end of 2002. Nevertheless, many WTO Ministers in Sydney appear more pragmatic in their approach to these issues than delegations negotiating in Geneva – but have only added momentum towards a final resolution of these complex issues in Geneva in December. Furthermore, it is obvious that the success of the Cancun Ministerial and the Doha agenda overall hinges on more sensitive and entrenched issues in the EU and US, on agriculture and antidumping, respectively (as raised by the Brazilian panelist). At the same time, developing countries must continue to demonstrate the level of pragmatism evident in Sydney in approaching their concerns on S&D provisions, TRIP/compulsory licensing and other priorities.

The next mini-ministerial will be hosted by Japan in February 2002, and will be scheduled prior to the critical deadline on agriculture modalities (and services offers) in March 2002.

Leadership Changes in the 108th Congress: Prospects for Trade

SUMMARY

Major trade items expected to top the trade agenda during the 108th Congress are the free trade agreements (FTAs) with Singapore and Chile and the FSC/ETI dispute. In addition, Committees likely will hold hearings on the FTAA and WTO negotiations, which both have proposed deadlines of 2005. The Congressional Oversight Group, which is composed of members of the House and Senate, will also be engaged in consultations with the United States Trade Representative regarding the long list of free trade agreements the US is set to launch, *i.e.*, Morocco, Central America, Australia, and Southern Africa.

Republican control of both the House and Senate will allow, Members willing, the Administration to dictate the trade agenda. Therefore, lack of floor time is not expected to hinder passage of the Singapore and Chile FTAs, which are expected to be concluded in December. The danger, however, exists that floor time for trade issues could be limited due to other Republican priorities.

Republican control of Congress will ease consideration of Republican initiatives, but control of the agenda does not ensure passage of Republican priorities. Analysts do not expect the Singapore and Chile FTAs to pass easily, even given the ability to provide adequate floor time in the House and Senate. Analysts fear that congressional debate on these FTAs will mirror the debate on TPA, thereby turning into a "TPA II" debate. In other words, Members of Congress essentially would ignore most of the provisions in the FTA and concentrate on what the Administration has negotiated on labor, environment, and investment. In the end, however, analysts expect Congress to approve the agreements.

The prospects for resolution of the FSC/ETI dispute appear slightly better with Grassley as the new Chairman of the Senate Finance Committee, but the outcome of the dispute remains unclear. Ways and Means Committee Chairman Bill Thomas (R-California) has taken a lead in trying to find a viable legislative solution to the dispute.

ANALYSIS

Introduction

The 2002 Congressional election results have bucked historical trends, with Republicans retaking the Senate and gaining ground in the House of Representatives. The party that controls the White House almost always loses ground in Congress in off-year elections, especially during a President's first term. That did not happen in this election cycle, for a variety of reasons, whether it is attributed to security initiatives or the mild recovery in the economy.

With Republicans now in control of both chambers of Congress, the Administration's legislative agenda, including on trade initiatives, will receive a decidedly warmer reception (especially in the Senate), but the path to legislative victories is still quite narrow. Both chambers will remain closely divided.

I. Reorganization

The House and Senate are currently involved in so-called lame duck sessions of the 107th Congress. The two chambers will not be officially reorganized until the 108th Congress convenes in January 2003. Democrats retain control of the Senate for the duration of the lame duck session because Senator Dean Barkley (I-Minnesota), who was appointed to serve the remainder of the late Senator Paul Wellstone's term, decided not to caucus with either party *(Please see W&C October 25, 2002 Trade Alert).* Although committees are not meeting, Democrats still technically retain control of Senate committees until the 108th Congress convenes. Senate leadership and chairmanships will change hands, and committees will be reorganized when Congress approves an organizing resolution at the beginning of the 108th Congress. The House will also undergo leadership and committee changes when the 108th Congress convenes.

II. Senate Results

Rather than widening their narrow margin of control, Senate Democrats lost their majority to Republicans. As it stands now, Republicans are certain to hold at least 51 seats. In Louisiana, Senator Mary Landrieu (D) failed to capture the 50 percent of the vote she needed to avoid a runoff election. Five Republicans vied for the Louisiana Senate seat. Landrieu now must face the top Republican vote getter, Suzanne Terrell, in a head-to-head race on December 7, 2002.

Democrats will hold at least 47 seats, with one Independent, Senator Jim Jeffords (Vermont), normally voting with them.

Senate leadership will consider the composition of Senate Committees after the Louisiana runoff election. It is unclear whether the Committees will comprise the same number of people and what the ratio of Republicans to Democrats on each Committee will be. Analysts speculate that the Republicans generally want to reduce the number of Senators on the Committees.

A. Senate Republican Leadership

- Senator Trent Lott (R-Mississippi) will return to the post of Majority Leader.
- Senator Mitch McConnell (R-Kentucky) was elected Majority Whip, replacing Don Nickles (R-Oklahoma), who was unable to run for another term due to term limits imposed by the Republican Conference.[6]
- Senator John Kyl (R-Arizona) will serve as Chairman of the Republican Policy Committee.

[6] Term limits force a change of leadership within Committees and Party Leadership, thereby allowing Members with new agendas to advance in seniority. The Republican Conference rules state that no individual shall serve more than three consecutive terms as Chair/Ranking Member or member of the Party Leadership.

- Senators Rick Santorum (R-Pennsylvania) and Kay Bailey Hutchison (R-Texas) will serve as Chairman and Vice Chair, respectively, of the Republican Conference.

- Senator George Allen (R-Virginia) will serve as Chairman of the National Republican Senatorial Conference Committee.

- Vice President Richard Cheney remains President of the Senate. The President of the Senate casts tie-breaking votes.

- Senator Ted Stevens (R-Alaska) replaces Senator Robert C. Byrd (D-West Virginia) as President Pro Tempore, who is the most senior member of the Majority Party.

B. Senate Democratic Leadership

- Senator Tom Daschle (D-South Dakota) will return to his post as Minority Leader.

- Senator Harry Reid (D-Nevada) continues as Democratic Whip.

- Senator John Corzine (D-New Jersey) will serve as Democratic Senatorial Campaign Committee Chairman.

- Senator Barbara Mikulski (D-Maryland) retains her post as Conference Secretary.

C. Senate Trade Leadership Returns to Grassley

Committee Leadership

Senator Charles Grassley (R-Iowa), a strong supporter of pro-trade initiatives, will return as Chairman of the Finance Committee in the next Congress, which has jurisdiction over trade issues. Four of the panel's current members are retiring: Senators Phil Gramm (R-Texas), Fred Thompson (R-Tennessee), Frank Murkowski (R-Alaska), and Bob Torricelli (D-NJ). It remains unclear who will take these open seats on the committee.

Senator Grassley started the last Congress as Chairman but was replaced by Senator Max Baucus (D-Montana) when Senator Jim Jeffords (I-Vermont) left the Republican Party and turned control of the Senate over to Democrats in mid 2001.

Trade Issues

Senator Grassley first ascended to the top spot in Finance after Senator William Roth (R-Delaware), another pro-trade Senator, was defeated in 2000. Grassley has worked for a strong trade liberalization agenda, including support for renewal of Trade Promotion Authority; the

bilateral agreement on China's WTO accession; trade agreements with Jordan and Vietnam and the launch of new FTAs; compliance with WTO findings against U.S. laws and practices; and support for the Doha Development Agenda negotiations. In fact, Grassley voted against the new U.S. Farm Law, warning that that it will undermine efforts by the United States to reduce agricultural subsidies in Europe and other countries around the world, particularly in the context of the Doha Round.

The biggest advantage resulting from the change in Senate leadership is the ability of the Republicans to control the agenda. Democrats no longer have the opportunity to hinder Administration trade priorities by refusing to consider certain issues. The most significant trade policy related changes likely to result from the shift in leadership pertain to the FSC/ETI issue and the relationship between Congress and USTR.

FSC/ETI: Recently, Senator Grassley has worked closely with Senator Baucus on legislation to end corporate inversions and to crack down on corporate tax shelters as a result of WTO findings against the U.S. FSC/ETI regime; these legislative initiatives will likely resurface in the next Congress. Baucus had stalled FSC/ETI compliance efforts, but Grassley will likely attempt to move efforts forward, including possible review of the Thomas Bill, which would repeal the ETI regime.

Congress-Administration Relationship: Baucus strongly supports greater Congressional involvement in trade policy, especially at the level of negotiations. He has been highly critical of USTR's position on Congressional consultations. Specifically, Baucus criticized USTR for denying Congressional observers access to negotiating sessions in the context of the U.S.-Chile FTA and for failing to provide Members of Congress with adequate time to review negotiating proposals. Grassley disagrees with Baucus' approach, instead agreeing with the Administration that USTR is exercising its rights under the separation of powers between the Executive and Legislative branches. For the aforementioned reasons, Grassley, as Chairman of the Finance Committee, is expected to be less critical and demanding of USTR, which may improve the relationship between USTR and the Senate Finance Committee. Analysts remain divided with regard to how Grassley's Chairmanship will affect the degree and frequency of Congressional involvement in negotiations.

Baucus is not expected to stifle his criticism of USTR's consultation procedures, but he will no longer be able to voice his opposition as Chairman of the Finance Committee, nor will he be able to call hearings on issues of particular concern to him. Baucus has become increasingly critical of WTO findings against U.S. laws and practices, and has been a supporter of the labor and environment agenda. He is a key player on trade issues and likely will continue to criticize the WTO dispute settlement system and insist that trade agreements include stronger labor and environmental protections.

Although Grassley and Baucus disagree on certain trade policy issues, they collaborated on the President's successful effort to renew Trade Promotion Authority and many other trade initiatives. Their cordial, collaborative relationship should continue, even as they again trade positions as Chairman and Ranking Member.

III. House Results

The elections solidified Republican control of the House. With all 435 seats up for grabs, Republicans actually widened their majority by as many as 12 seats. House Republicans will hold at least 228 seats. Three House races are still undecided in Colorado, Louisiana, and Hawaii.

A. House Republican Leadership

Although Republicans maintain control of the House, they will make several leadership changes.

- The Republican Caucus elected Majority Whip Tom DeLay (R-Texas) to be the new Majority Leader. The current Majority Leader, Representative Richard Armey (R-Texas), did not seek reelection to Congress this year.

- Representative Roy Blunt (R-Missouri) was elected Majority Whip.

- Representative J. Dennis Hastert (R-Illinois) remains in the number-one position as Speaker of the House.

- Representative Chris Cox (R-California) was elected Republican Conference Chairman. The Republican Conference Chairman for the 107th Congress, J.C. Watts (R-Oklahoma), did not seek reelection to Congress.

- Representative Deborah Pryce (R-Ohio) filled the vacancy left by Cox when she took the position as Chairwoman of the Republican Policy Committee. Although Pryce's election did not receive the level of publicity as Nancy Pelosi (please see below), Pryce is the first woman to hold an equivalent or higher post in the Republican Conference.

B. House Democratic Leadership

The House Democratic Caucus elected Representative Nancy Pelosi (D-California) as the new Minority Leader, replacing Representative Richard Gephardt (D-Missouri) by a vote of 177-29. Pelosi's opponent, Representative Harold Ford (D-Kentucky), is the most conservative member of the Congressional Black Caucus. In the wake of the Democratic elections defeat, Ford was one of the first to call for new Democratic leadership. Many have criticized Pelosi for being too liberal. Nonetheless, she handily defeated Ford to become the first woman elected to a Congressional leadership post. In a move intended to calm those who fear that she is too liberal to lead the party, Pelosi announced that Representative John Spratt (D-South Carolina) would be her top assistant. Spratt has a more moderate image and voting record.

Representative Steny Hoyer (D-Maryland) was elected Minority Whip, and Representative Robert Menendez (D-New Jersey) will serve as Democratic Caucus Chairman.

Analysts believe outgoing Leader Gephardt will now focus on his Presidential aspirations.

C. House Trade Leadership: Thomas Remains Chairman

The House Ways and Means Committee, where all trade legislation originates, will remain under the chairmanship of Representative Bill Thomas (R-California), while three of its current Committee members will depart. Representatives Wes Watkins (R-Oklahoma) and Bill Coyne (D-Pennsylvania) are retiring, and Representative Karen Thurman (D-Florida) lost her bid for reelection. Replacements for these seats on the panel have not yet been named.

Phil Crane (R-Illinois) is expected to continue serving as Chairman of the Subcommittee on Trade.

Chairman Thomas was critical to securing renewal of Trade Promotion Authority for the President this year.

Recently, Representative Thomas took the lead in finding a legislative response to the WTO decision against the FSC/ETI regime. In doing so, he proposed a holistic approach, arguing that the larger issue of international tax reform must be addressed as part of any response to the ETI. He introduced a major bill that would replace the ETI regime with nearly 20 international tax incentives, crack down on corporate tax shelters, and tighten the tax treatment of corporate inversions and earning stripping. The bill encountered criticism from business and never saw a hearing or markup this year. It also faced strong opposition from Max Baucus on the Senate side. Even with Grassley taking the chairmanship of the Finance Committee, it is uncertain whether Chairman Thomas will stick with the same approach to push the ETI legislation through Congress or whether he will attempt to separate the ETI issue from other international tax reform issues.

Unlike the Senate Finance Committee, bipartisan collaboration is a rarity on the House Ways and Means Committee. For years, Democrats on the panel have complained that they have little input on the timing and substance of the panel's agenda, especially since Thomas took the helm. In particular, Ranking Member Charles Rangel (D-New York) has complained of a lack of consultation on matters including TPA renewal; the relationship between trade and environment with WTO and other trade rules; FSC/ETI repeal; among other issues. (Republicans made similar complaints when Representative Dan Rostenkowski (D) was Chairman.) This partisan sniping on trade and other issues likely will continue on the committee.

IV. Other Committee that Could Affect International Trade Issues

The Senate Finance Committee and the House Ways and Means have primary jurisdiction over trade matters. We highlight below the expected changes to other Senate and House Committees that also consider trade legislation.

Committee	108th Congress Chair	107th Congress Chair
Senate Commerce, Science, and Transportation Committee[7]	John McCain (R-Arizona)	Ernest Hollings (D-South Carolina)
Senate Foreign Relations Committee	Richard Lugar (R-Indiana)	Joseph Biden (D-Delaware)
Senate Banking, Housing and Urban Affairs	Richard Shelby (R-Alabama)	Paul Sarbanes (D-Maryland)
House Energy and Commerce Committee	Billy Tauzin (R-Louisiana)	(same)
House Infrastructure and Transportation Committee	Don Young (R-Alaska)	(same)
House International Relations Committee[8]	Henry Hyde (R-Illinois)	(same)
House Armed Services Committee	Duncan Hunter (R-California)	Bob Stump (R-Arizona)

OUTLOOK

Analysts view the Republican victories as a positive development for the Administration's ability to enact its trade policy objectives. Nevertheless, Congressional leadership, in particular of the committees of jurisdiction over trade, does not ensure that all legislative efforts on trade will be easily approved. Moreover, it remains unclear exactly how the committees will be comprised (*i.e.*, party ratios and number of members).

Both parties must cooperate in order to move forward on issues including compliance with the many recent WTO findings against U.S. laws and practices and an ambitious agenda in WTO, regional, and bilateral trade negotiations. Furthermore, with the passage of the Trade Act of 2002, Congress has a stronger oversight role in trade policy – and both committees have demanded greater access and input on trade negotiations.

[7] The Senate Commerce, Science, and Transportation Committee and the House Infrastructure and Transportation Committee approved port security legislation in the 107th Congress, which the President is expected to sign into law.

[8] The House International Relations Committee and the House Armed Services Committee have jurisdiction over the Export Administration Act (EAA), which failed to make it to the House floor in the 107th Congress. The Senate, however, approved a version of the EAA (S-149) that the Administration supports.

WTO WORKING BODIES

Progress on WTO Harmonization of Non-Preferential Rules of Origin Stalls in the Face of a Dispute on the Scope of the Agreement on Rules of Origin

SUMMARY

Since the June 28, 2002 meeting of the WTO Committee on Rules of Origin (CRO), progress on the negotiations on the outstanding issues has stalled (*Please see the August 2002 WTO Report - "Work of WTO Harmonization of Non-Preferential Rules of Origin at Impasse Over Application of Trade Remedies"*). The General Council did not take up the report of the CRO Chairman during its October 2002 meeting. Rather, the General Council Secretary asked the CRO Chairman to conduct one-on-one, private negotiations with the CRO members to work towards consensus on the outstanding issues. These private meetings were conducted in November. The CRO Chairman's efforts did not succeed.

One issue in particular has bogged down progress towards consensus: the "implications of implementation" issue (*i.e.*, whether the harmonized rules should apply to other WTO Agreements). The United States and several other Members have argued that the Agreement on Rules of Origin does not require that Members use the harmonized rules of origins when implementing other WTO Agreements, while most Members believe that a plain reading of Article 1.2 of the Agreement on Rules of Origin mandates that Members apply the harmonized rules. Because the resolution of the "implications of implementation" issue will dictate the scope of the application of the Agreement on Rules of Origin, there likely will be no further progress on the harmonization work program unless the General Council can achieve consensus regarding this fundamental issue.

Because of the failure of the private negotiations, the General Council likely will take up the CRO Chairman's report at a future meeting. Consequently, the December 2002 deadline for completion of the harmonization work program most likely will not be met.

ANALYSIS

I. The State of Play of the Negotiations on the Rule of Origin Committee Chairman's Proposal

A. Background on the Negotiations

WTO General Council in its December 19-21, 2001 meeting instructed the Committee on Rules of Origin (CRO) to hold two sessions during the first half of 2002 to resolve remaining issues on the harmonization work program for non-preferential rules of origin.[9] The General Council also asked the Chairman of the CRO to identify a list of core policy-level issues to

[9] Please see the August 2002 WTO report for a more detailed description of the efforts of the CRO during the first half of 2002 and the key issues (*i.e.*, the twelve crucial issues) under consideration.

report to the General Council for discussion at the General Council level. Following the two meeting during the first half of 2002, the Chairman of the CRO sent a list of twelve crucial issues to the General Council. Despite the General Council's December 2001 instructions to the CRO and commitment to consider the CRO Chairman's report in the first regular meeting of the General Council after the end of June 2002, the General Council did not put the Chairman's report on its agenda for its October 15-16, 2002 meeting.

B. From Committee Negotiations to Private Negotiations and Back Again

The General Council Secretary, however, declined to accept the CRO Chairman's report as an agenda item because there already were too many issues on the agenda. Instead, in mid-October, the General Council Secretary, who recognized that there was no prospect for achieving consensus at the CRO, asked the CRO Chairman to conduct one-on-one negotiations on behalf of the Secretary with the relevant Members. The Secretary believed that direct meetings with the Members, coupled with mediation by the CRO Chairman, might offer a better alternative to reaching consensus on the most controversial issues.

Since October, the CRO Chairman has held personal meetings in his capacity of representative of the General Council Secretary with the various delegations. There also have been small group discussions. These meetings have been private and informal with no official submissions or records. Of the twelve crucial issues identified by the CRO Chairman in his report to the General Council, the CRO Chairman focused his efforts on the "implications of implementation" issue (*i.e.*, whether the harmonized rules should apply to other WTO Agreements). Resolution of all other crucial issues hinges upon reaching consensus on the "implications of implementation" issue. Despite the backing of the General Council Secretary and the new negotiating format, the CRO Chairman's effort did yield consensus. In late November, the Chairman notified the General Council Secretary that the one-on-one negotiations initiative was unsuccessful and that continued negotiations in this format likely would not lead to satisfactory results.

II. U.S. Decoupling Theory (Implications of Implementation Issue)

A. Dispute over the Scope of the Application of the Harmonized Rules

As noted above, the "implications of implementation" issue is the key impediment to a breakthrough on the harmonization work program. The United States has argued that the Agreement on Rules of Origin does not require that the harmonized rules be used during the implementation of other WTO Agreements. The U.S. position does not appear to be consistent with the requirements of the Agreement on Rules of Origin, however. A plain reading of Article 1 of the Agreement on Rules of Origin appears to close off the possibility of separating the disciplines under the Agreement and determinations under trade remedy law. In particular, Article 1.2 states:

> Rules of origin referred to in paragraph 1shall include all rules of origin used in non-preferential commercial policy instruments, such as in the application of: most-favoured-nation treatment under Articles I, II, III, XI and XIII of GATT

> 1994; anti-dumping and countervailing duties under Article VI of GATT 1994; safeguard measures under Article XIX of GATT 1994; origin marking requirements under Article IX of GATT 1994; and any discriminatory quantitative restrictions or tariff quotas. They shall also include rules of origin used for government procurement and trade statistics.

B. Development of the Dispute

The debate on the "implications of implementation" issue surfaced in early 1998 with an Indian submission to the CRO.[10] India requested that the CRO ask the WTO Secretariat to prepare an analysis paper in regard to the major proposals on rules of origin in the textile sector. The Indian submission complained that "[i]t was not clear as to how the origin rule on the basis of either two sets of proposals would impact the flow of trade and/or the rights and obligations under various WTO instruments referred to in the Agreement on Rules of Origin."[11] With the issue now highlighted by India, the United States in a May 1998 submission also called formally for a "fundamental review of the relationship of the Agreement on Rules of Origin to other Agreements." The United States noted the differing approaches to this issue:

> Consultations at the Committee on Rules of Origin on various product-specific proposals have made clear the existence of differing views with regard to the use of rules of origin and the relationship with the operation of various non-preferential commercial policy instruments.[12]

The United States argued that the use of the term "origin" or "country of origin" in other WTO agreements did not necessarily refer to the disciplines under the Agreement on Rules of Origin:

> In this regard, the use, or application of rules of origin for a particular administrative purpose may be a separate matter from the development and implementation of particular trade measures or commercial policy instruments that fall under the jurisdiction of other Agreements.[13]

---

[10] G/RO/W/28/Rev.1, Preparation of an Analysis Paper by the Secretariat in Regard to the Major Proposals on Rules of Origin in the Textiles Sector, April 24, 1998.

[11] Id.

[12] G/RO/W/32, Impact of the Harmonized Rules of Origin on Other WTO Agreements, May 25, 1998 ("Building on the Indian proposal, the United States proposes that given the importance in regard to the work programme leading to the harmonization of non-preferential rules of origin, the Committee on Rules of Origin should separately initiate discussions on the interplay of various provisions of the Agreement on Rules of Origin, and develop a common understanding of the implications of the future discipline to apply the harmonized rules of origin 'equally for all purposes set out in Article 1.'").

[13] Id. (emphasis in original).

Under the U.S. interpretation, unless a separate WTO Agreement makes reference to the Agreement on Rules of Origin or to terms that are specifically defined in the Agreement, a Member need not apply the harmonized rules of origin.

The United States cautioned that the harmonized rules should not be applied indiscriminately in a fashion that would "impinge on the rights and obligations under [other] Agreements subject to the jurisdiction of other bodies."[14] The U.S. submission did not refer to specific Agreements or bodies, but it was understood that the United States was concerned about application of the harmonized rules of origin to trade remedy laws (*i.e.*, antidumping, countervailing duty and safeguards) and origin marking requirements.

In a May 2001 submission to the CRO, the United States clarified its interpretation of, and concerns about, Article 1.2. In particular, the United States noted concerns about the application of harmonized rules of origin to the following:

- marks of origin under Article IX of GATT 1994;
- "geographical indications" under the Agreement on Trade-Related Aspects of Intellectual Property Rights
- SPS measures under the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement)
- considerations regarding "exporting country" in antidumping investigations under the Agreement on Implementation of Article VI of GATT 1994 (AD Agreement)

With respect to origin marks and geographical indications, the United States is concerned that the application of the harmonized rules would create consumer confusion due to potentially misleading labeling. The United States cites the example of "100% Columbian" coffee, which U.S. consumers understand refers to coffee beans picked in Columbia and not necessarily the location where such beans were roasted and ground. Under one proposal for the harmonized rule for coffee, the location of roasting and grinding would determine the origin of the coffee. The United States argues that a requirement that coffee grown in Columbia and roasted in a third country must be labeled as originating from the country where the beans were roasted would result in misleading indications. The United States claims that flexibility in the application of the harmonized rules in such cases is necessary.

The United States also argues that a rigid application of the rules of origin to the SPS Agreement would hinder the ability of Members to apply measures that protect against certain health hazards. For example, if a Member has a SPS measure in place against Brazilian coffee due to the pesticide practices in that country and a harmonized rule whereby origin is determined

[14] Id.

by the location of roasting and grinding, the Member might not be able to prevent the Brazilian grown coffee from entering the country if the beans are roasted in a third country.

The greatest concern for the United States regarding the "implications of implementation" issue appears to be the potential effect on trade remedy law. In particular, the United States objects to the use of harmonized rules of origin in the determination of the origin of products covered by antidumping investigations. The United States is concerned that mandatory application of the harmonized rules in the dumping context would limit the flexibility in capturing imports in a given case. In particular, the United States fears that other Members will use the harmonized rules as a basis for undermining the U.S. anticircumvention law.

The U.S. fear is justified, however. The United States argues that under the Ministerial Decision on Anti-Circumvention the issue of anticircumvention law, its scope and requirements is still open. The Informal Group on Anticircumvention under the Committee on Anti-dumping practices currently is working to formulate formal rules regarding anticircumvention. The United States believes that other WTO Members are trying to use the harmonized rules of origin as a tool to close off the work of the Informal Group on Anticircumvention and severely limit anticircumvention law.

The United States now views the "implications of implementation" issue as intertwined with the U.S. efforts at the Informal Group on Anticircumvention and in a broader context than simply part of the harmonization program. To that end, the United States will continue to resist all efforts that it perceives as a threat to its position on anticircumvention and with respect to other issues. This has led to the standstill in progress on the negotiations on the work on harmonized rules of origin.

The United States does have support from Japan and other countries on certain aspects of its decoupling argument. For example, Japan has made written submissions to the CRO explaining the necessity of separating the harmonized rules of origin from the labeling requirements for food and SPS measures.[15]

C. Attempt at Compromise

At the June 2002 CRO meeting, the CRO Chairman offered a compromise proposal, which had the support of the United States. The Chairman's compromise cited Members' obligation to apply the harmonized rules of origin equally for all non-preferential commercial policy instruments as the basis for an exception that would allow Members to apply individual rules of origin in limited circumstances:

---

[15] G/RO/W/66, Relations Between the Harmonized Rules of Origin and the Labeling Requirements on Foods, June 22, 2001 ("It is reasonable to understand that the results of the ongoing harmonization work on the rules of origin shall not hinder the labeling requirements, especially applied to foods for the purpose of providing information to consumers, as introduced in some Members."); G/RO/W/74, Implications of the Implementation of the Harmonized Rule of Origin on Other WTO Agreements, March 5, 2002 ("It is not logical in itself to refer to the harmonized rules of origin in deciding whether to apply sanitary and phytosanitary measures.").

> Each Member, in accordance with its rights and obligations under the provisions of the WTO Agreements [other than this Agreement], is to decide whether the rules of origin are used in its non-preferential commercial policy agreements.[16]

The Chairman's proposal recognized the distinction that the United States had cited as justification of its insistence that the harmonized rules of origin do not automatically govern other disciplines, such as antidumping or labeling of origin. In the face of strong opposition from Brazil, Columbia, India, Egypt, and New Zealand, the Chairman was unable to create a consensus of support for his proposal.

OUTLOOK

It is now up to the General Council Secretary to decide an approach to settle these issues. Given that all other efforts have failed and that the General Council decided in December 2001 to address the issues that the CRO was unable to resolve on its own by mid-2002, it is likely that the Secretary will add the twelve crucial issues, if not the entire core issue package, to a future meeting agenda. It is clear that the General Council will not meet the end of 2002 deadline for the completion of the harmonization work program.

It is widely believed that unless the "implications of implementation" issue is resolved that progress on the other issues is unlikely. This sentiment is shared by the United States, which has warned that there will be no progress on the harmonized rules of origin unless the implications of implementation issue is addressed first. At the June 28, 2002 CRO meeting, the U.S. representative stated that:

> [t]he reason why the CRO has not been able to achieve resolution of so many crucial product-specific issues was the absence of a common understanding of the provisions of the Articles of the Agreement under discussion . . . .

Furthermore, the dispute on the "implications of implementation" issue has become intertwined with broader issues and Members, according to some observers, have become involved in gamesmanship. It is unlikely that this issue will be resolved in the near future.

[16] G/RO/M/41, Minutes of the Meeting of 28 June 2002, July 16, 2002.

Cambodia Aims to Join the WTO by Cancún Ministerial

SUMMARY

The Working Party on Cambodia's accession[17] to the WTO ("Cambodia WP") held its third meeting in Geneva on November 14, 2002. At the most recent session of the Cambodia WP, the WTO Secretariat has prepared and received the following accession instruments:

- Cambodia's customs tariff schedule for 2001;
- Offer on goods tariffs;
- Offer on specific commitments in services;
- List of domestic support and export subsidies in agriculture; and
- Various draft laws and rules, including on customs, copyright and insurance

Cambodian negotiators also undertook bilateral negotiations on the fringes of the Working Party in Geneva with the European Communities ("EC") and other Members. The WTO Accessions Division has scheduled a follow-up meeting in the spring of 2003, which is likely to be one of the last meetings before Cambodia's formal accession to the WTO. Analysts expect the final Working Party Report on the Cambodian accession to be completed by late March or early April. Cambodia hopes to join the WTO at or before the Fifth WTO Ministerial Conference in Cancún, September 10-14, 2003.

ANALYSIS

I. Background on Cambodia's Accession Efforts

Cambodia's Working Party was established on December 21, 1994. Cambodia submitted a memorandum on its foreign trade regime in June 1999. Replies to questions concerning the memorandum were circulated in January 2001. At the Cambodia WP in May 2001, Cambodia distributed its legislative efforts including the adoption of a new Law on Marks, Trade Names, and Acts of Unfair Competition; a Law on the Protection of Patents, Utility Model Certificates, and Industrial Designs; a Law on Insurance; and a Land Law.

During the February 2002 meeting, Cambodia complained that some trading partners were making unreasonable market access demands of Cambodia. The United States, in particular, had criticized the initial Cambodian market access offer for goods and services as well as Cambodia's effort at creating WTO-compliant domestic trade regulations.

[17] Andrea Meloni (Italy) chairs the Working Party. The members of the Working Party are: Australia, Canada, China, European Communities and member states, India, Japan, Republic of Korea, Malaysia, New Zealand, Singapore, Chinese Taipei (Taiwan), Thailand, United States and Venezuela.

The schedule of the Working Party is listed below:

Event	Date
Cambodia's application formally received by the WTO Secretariat	**December 8, 1994**
Working Party established	**December 21, 1994**
Memorandum of Foreign Trade Regime received	**June 23, 999**
Meetings of the Working Party (three formal meetings)	**May 22, 2001** **February 14, 2002** **November 14, 2002**
Tariff Offers	**Since December 11, 2001**
Draft Services Schedule	**Since December 11, 2001**
Legislative Action Plan	**Since December 11, 2001, 2002**
Next Working Party Meeting	**Spring 2003**
Accession Target of Cancún Ministerial Meeting	**September 10-14, 2003**

The Cambodian Ministry of Commerce serves as the focal point for its WTO accession and is staffed by ten full-time professionals in the WTO office. Since September 1997, the Minister of Commerce chairs an Inter-Ministerial Coordinating Committee on WTO Accession. The Inter-Ministerial Committee has 15 policy level staff and three officials from each of the 23 Cambodian ministries and agencies involved in WTO-related activities.

II. Progress Achieved at November Working Party

The November 14 meeting of the Working Party marks the first time WTO Members discussed the elements of a draft Working Party Report and, thereby, concentrated on agreeing to Cambodia's terms of entry. Since the last meeting of the Cambodia WP in February 2002, Cambodia has provided 17 laws and draft rules to WTO Members for review. Cambodia has also completed a draft civil procedural code and is making progress with respect to trademark protection. Cambodia has benefited from technical assistance made available to least-developed countries under the "Integrated Framework" initiative launched in 1997 (which involves the WTO and other international organizations) to enable it to comply with WTO obligations.

The following are laws and draft rules provided by Cambodia to WTO Members in its efforts to bring them into compliance with WTO compliance:

- Revised Draft Law on Copyright and Related Rights dated May 2002;
- Revised Draft Insolvency Law dated July 2002;
- Revised Draft Tourism Law dated 23 May 2002;
- Draft Water Supply and Sanitation Regulatory Law;
- Draft Law on Customs dated 15 August 2002;
- Draft Amendment of the Law on Investment dated 29 March 2002;
- Draft Law on Negotiable Instruments and Payment Transactions dated September 2002;
- Draft Law on the Protection of Patents, Utility Model Certificates and Industrial Designs dated 12 October 2001;
- Draft Law on Fisheries;
- Draft Sub-Decree on Plant Quarantine;
- Draft Sub-decree on Sanitary Inspection of Animal and Animal Products dated 11 June 2002;
- Draft Sub-Decree on Insurance dated 21 September 2002;
- Law on Corporate Accounts, Their Audit and The Accounting Profession;
- Law on Forestry dated August 2002;
- Draft Civil Code dated 3 September 2002;
- Decision on the Establishment of the Inquiry Points for (1) Services, (2) SPS, (3) TBT, and (4) Legal compliance with WTO agreements dated 26 July 2002;
- Financial Blueprint of the Royal Government of Cambodia (2001-2010).

III. Implementation and Transition Periods

The Cambodian government has requested transition implementation periods for some of its WTO commitments beyond the date of its accession. Although WP members are sensitive to the fact that Cambodia is the WTO's first least-developed country (LDC) applicant, some

Members have asked Cambodia for a specific timetable of its eventual commitments. In particular, the US requested greater detail on Cambodia's timetable regarding the implementation of intellectual property provisions and when Cambodia would establish commercial courts.

Cambodia is accepting technical assistance to train judges in commercial and other specialist issues, and the Ministries of Justice and Commerce are preparing a draft law establishing a Commercial Tribunal. In the interim, commercial cases are brought before provincial and municipal courts, which the US deems inadequate to deal with the issues.

In another controversial point, both Australia and the US expect Cambodia to bind its agricultural export subsidies at the current value of zero. This would mean that Cambodia would, in effect, lose the right to provide agricultural export subsidies to its producers, even in the event that these becomes a viable option. Australia also urged Cambodia to use tariffs because tariffs are more transparent. Furthermore, Members of the Working Party cautioned Cambodia that any use of tariff rate quotas on agricultural imports would complicate Cambodia's market access negotiations.

Cambodia has not yet developed any trade remedy legislation. According to the Cambodian legislative agenda, officials will not likely approve Cambodia's laws on antidumping measures, safeguards, and countervailing measures until the second half of 2004.

OUTLOOK

If Cambodia does accede to the WTO at the Cancún Ministerial meeting, it would be the first least-developed country to join the WTO since 1995 (about two dozen other Members were GATT contracting parties and automatically joined the WTO in 1994). In addition, Cambodia's membership would be an encouraging development considering the Doha mandate on LDCs: "We agree to work to facilitate and accelerate negotiations with acceding LDCs" (paragraph 42).

ASEAN, which Cambodia joined in April 1999, backs Cambodia's bid for WTO Membership – and hopes for similar progress for its two other WTO-applicant members: Vietnam and Laos. Vietnam's accession efforts hit a snag when Vietnam's Working Party decided not to hold another meeting until 2003. At the Cambodia WP meeting, ASEAN WTO members, backed strongly by LDCs Djibouti and Haiti, as well as China urged developed trading partners to be flexible in their demands on Cambodia. The fact that the WTO Secretariat has already arranged the tentative date for the next meeting of the Working Party in March or April 2003, is a good sign that Cambodia is on track to accede by the Cancún Ministerial.

EC and Japan Submit Proposals on Industrial Market Access to the WTO

SUMMARY

The European Communities ("EC") and Japan recently tabled new proposals in the context of WTO negotiations on market access for non-agricultural products. The EC proposal tabled on 31 October 2002 calls for a "compression mechanism" approach to lowering tariff rate bands on industrial goods and in order to reduce tariff peaks. The EC also suggests approaches to developing country concerns, including longer transition periods for liberalization and targeting products of interest to developing countries. This EC proposal was made to a meeting of the Negotiating Group on Market Access ("NGMA") held on 4-5 November 2002, and expands on its first proposal submitted in June 2002. Japan submission to the NGMA tabled on 5 November 2002, presents an ambitious plan for tariff reductions including a zero-for-zero harmonization approach for a wide range of goods not covered in the Uruguay Round.

ANALYSIS

I. Background

The EC's initial submission to the NGMA presented in June 2002[18] was the first to that negotiating group. Drawing on the mandate of the Doha Ministerial Declaration[19], the EC's first submission states its commitment to comprehensive coverage of goods, and states that the reduction of tariff and non-tariff barriers should be aimed in particular at products of export interest to developing countries. The EC also stresses securing "deeper than average cuts for … environmental goods."[20] Developing countries, however, are concerned that the EC focus on environmental goods may lead to discrimination between goods on the basis of production and process methods.

[18] Market Access for Non-Agricultural Products – Communication from the European Communities, TN/MA/W/1, 24 June 2002

[19] Doha Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001. Paragraph 16 reads as follows: "We agree to negotiations which shall aim, by modalities to be agreed, to reduce or as appropriate eliminate tariffs, including the reduction or elimination of tariff peaks, high tariffs, and tariff escalation, as well as non-tariff barriers, in particular on products of export interest to developing countries. Product coverage shall be comprehensive and without *a priori* exclusions. The negotiations shall take fully into account the special needs and interests of developing and least developed country participants, including through less than full reciprocity in reduction commitments, in accordance with the relevant provisions of Article XXVIII *bis* of GATT 1994 and the provisions cited in paragraph 50 below. To this end, the modalities to be agreed will include appropriate studies and capacity-building measures to assist least-developed countries to participate effectively in the negotiations."

[20] TN/MA/W/1, 24 June 2002, para. 11.

On 31 October 2002, the EC made a second submission on the modalities for non-agricultural market access to the NGMA.[21] In its second submission, the EC suggests a "comprehensive mechanism" approach to lowering tariff rate bands and reduce tariff peaks. The EC also suggests approaches to developing country concerns.

Since the last meeting of the NGMA on 12-13 September 2002, other WTO Members including Canada, Hong Kong, India, Japan and Singapore have made submissions to the NGMA. The United States is expected to make a submission in late November 2002.

II. EC Second Submission: "Compression Mechanism" Approach

The EC has proposed a "compression mechanism" approach to lower tariff rate bands on industrial goods and in order to reduce tariff peaks[22]. Although the EC proposal does not specify the range of lower rates it seeks to accomplish, the compression mechanism "must result in considerably reduced tariff rates with limited dispersion…"[23] This approach would reduce ad valorem and specific tariffs, and could be extended to reconcile discrepancies between tariffs on goods at various stages of production. The key is to reduce tariff escalation – which is the application of higher tariff rates to goods that have higher value-added input.

The EC's compression mechanism might be considered as targeting not only developed but also the more advanced developing countries that maintain higher tariff rates on foreign industrial goods.

III. Development Focus

In line with the Doha Development Agenda, the EC submission seeks support from developing country Members by proposing that all Members "agree to deeper cuts for textiles, clothing and footwear […]".[24] The EC's goal, in this respect, is to bring these tariffs as close to zero as possible. The EC also acknowledges that this will not be possible solely through a "compression mechanism" approach.

In addition to emphasizing tariff reduction and equalization, the EC suggests the following approaches to developing country concerns:

- ***Tariff and quota elimination for LDC products by May 2003*** – Targets products exported from least-developed countries as a priority.

---

[21] Market Access for Non-Agricultural Products – Communication from the European Communities, TN/MA/W/11, 31 October 2002

[22] A tariff above 15 percent is generally considered a tariff peak. These are common in textiles trade.

[23] TN/MA/W/11, 31 October 2002, para. 5.

[24] Ibid. para. 10

- ***Elimination of duties lower than a pre-agreed level*** – Targets reduction of "nuisance tariffs" that are low and remain despite being of little economic value to the recipient. Developed countries are the main users of "nuisance tariffs" – which often target goods from LDCs and other developing countries.

- ***Staggered phase-in for developing Members*** – Suggests a longer phase-in period for reduction commitments by developing country Members.

The EC also seeks greater commitments from the more advanced developing countries. The notion of separating developing countries is controversial and has provoked much criticism from certain Members at meetings of the NGMA. For the EC to take such a position is not without precedent: in the Uruguay Round, the EC unilaterally declared that it would not consider Hong Kong, Singapore and South Korea developing countries.

In addition, the EC emphasizes that negotiations must address non-tariff barriers and export restrictions as well and notes that it will present another submission dealing solely with these distortions. The EC also states that it would be willing to negotiate credit for autonomous liberalization which results in bound tariff rates.

IV. Japanese Submission: Ambitious Liberalization

The Japanese submission suggests an aggressive approach to liberalization, including zero-for-zero harmonization. It is much more detailed than that of the EC, and proposes the following goals for the market access negotiations:

- ***Ratio of bound to unbound tariffs*** – Calls for improvement in the ratio of bound tariff lines to all tariff lines.

- ***Reduce disparity in tariff rates –*** Similar to the EC's compression mechanism, Japan seeks to close the wide disparity in tariff rates among Members' tariff rates via a trade-weighted average formula. Japan proposes using the import data of values for the year 2000 as the statistical base.

- ***Zero-for-zero harmonization*** – Praises the results of the "zero-for-zero" harmonization approaches in the Uruguay Round, and recommends the approach for products that were not comprehensively addressed. Japan cites: consumer electrical products, bicycles, cameras, watches, electrical machinery parts, motor vehicles, machine tools, and construction equipment. With respect to textiles, Japan attaches an annex citing modalities:

i. Textiles and clothing trade should be handled through a sectoral approach;

ii. Different tariffs in textiles should be harmonized into an agreed rate of duty on a line by line basis;

iii. Tariff negotiations on textiles and clothing should be a separate approach from the trade-weighted average tariff reduction formula; and

iv. Negotiations on textile market access should include discussions of non-tariff barriers, country of origin marking, transshipment and address violations of intellectual property rights.

- ***Implementation periods*** – The Japanese proposal suggests a five year implementation period beginning in January 2005, with a longer phase-in period for developing countries (similar to the EC approach) based on special and differential treatment and in reward for deeper tariff cuts.
- ***Market access on environmental goods*** – Citing the mandate of the Doha Declaration[25], Japan proposes a list of environmental goods for improved market access. Japan also submitted its proposal to the Committee on Trade and Environment because the definition of environmental goods is likely to be taken up in that Committee. Japan cites environmental products as including weighing machines, silencers and exhaust pipes, parts of air-conditioning machines, certain types of motor cars and vehicles and flat panel display devices.

OUTLOOK

Despite the emphasis by the EC on developing countries, many WTO Members are concerned that efforts to expedite liberalization in industrial goods will outpace progress in areas like agriculture – which for many developing countries is their top priority in the Doha round negotiations. Nevertheless, the EC and Japan have made ambitious proposals since the delayed launch of industrial market access negotiations in July 2002, and emphasize accommodating developing country concerns through longer transition periods and reductions of tariffs in textiles and manufactured goods of interest to developing countries. The US is also expected to submit an ambitious liberalization proposal in late November.

WTO Members are scheduled to reach a common understanding on possible modalities by the end of March 2003, and face a deadline for establishment of negotiating modalities by May 2003. This two-stage deadline is a result of EC urging, and was an attempt by the EC to link the schedule for industrial goods with important deadlines for agriculture and services negotiations in March 2003. Despite the staggered deadlines, most Members are still far from reaching agreement on negotiating modalities for industrial goods.

[25] Doha Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001, para. 31 (iii) reads: "…the reduction or, as appropriate, elimination of tariff ad non-tariff barriers to environmental goods and services."

DISPUTE SETTLEMENT UNDERSTANDING

U.S. Department of Commerce Modifies the "Arm's Length" Test in Affiliated Party Transactions to Implement the WTO Appellate Body's Ruling in Hot-Rolled Steel Products from Japan

SUMMARY

On November 15, 2002, the U.S. Department of Commerce (DOC) announced that it was modifying its practice regarding the determination of "arm's length" transactions between affiliated parties in antidumping proceedings. A WTO Dispute Panel and Appellate Body ruled in February 2001 and August 2001 respectively that the DOC's prior practice violated WTO requirements.

In particular, the Panel and the Appellate Body found that the DOC's prior practice had the effect of unfairly raising dumping margins for respondents in U.S. proceedings. The DOC will apply the modified practice to the underlying case (certain hot-rolled products from Japan), including the establishment of new cash deposit rates for all producers for whom the investigation rates are still applicable, with respect to unliquidated entries of the subject merchandise which are entered, or withdrawn from warehouse, for consumption on or after the date on which the United States Trade Representative (USTR) directs the DOC to implement that determination. The new test also will apply to future investigations and reviews initiated on or after November 23, 2002.

The effect of the new test will not become clear until the DOC applies the new standard to new investigations and reviews.

ANALYSIS

I. Background

A. DOC Past Practice and WTO Appellate Body Ruling

On November 15, 2002, the DOC published in the Federal Register a public notice that the DOC was modifying its practice regarding "arm's length" transactions between affiliated companies in order to implement the recommendations of the WTO Appellate Body in *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("*Hot-Rolled from Japan*").[26] In *Hot-Rolled from Japan*, the Appellate Body ruled that the U.S. practice regarding use of affiliated party sales prices in the calculation of dumping margins was not consistent with the Agreement on Implementation of Article VI of GATT 1994 (the "AD Agreement"). In particular, the Appellate Body found that the calculation of normal value under Article 2.1 of the AD Agreement was improper. Article 2.1 requires that administering

[26] United States-Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R (July 24, 2001), WT/DS184/R (Feb. 28, 2001).

authorities calculate the amount of dumping by comparing the "normal value" of a product in the exporter's home market or other third country market "in the ordinary course of trade" with the export price of the product.

Under the DOC practice examined by the Appellate Body, the DOC excluded from the calculation of normal value sales by exporters or producers in the comparison market that were determined not to be in the ordinary course of trade. The DOC's test treated comparison market sales from an exporter or producer to an affiliated company as arm's length transactions (*i.e.*, within the normal course of trade) if the average prices of the sales were at least 99.5 percent of the prices charged by the exporter or producer to unaffiliated customers in the comparison market. The test did not reject any prices if such prices on average were above 100 percent of the average prices charged to unaffiliated customers. By excluding only lower-priced sales as not in the ordinary course of trade but not higher-priced sales, the DOC applied a discriminatory test that excluded only those affiliated party sale prices that would lower the calculated normal value (*i.e.*, rejection of prices below the 99.5 percent of average threshold). Conversely, the DOC included sales prices that raised the calculated normal value (*i.e.*, inclusion of sales prices that were above a corresponding higher threshold).

1. Panel/Appellate Body: DOC Test Skews Calculation of Normal Value

The WTO DSB Panel found that the DOC's arm's length test improperly skewed the calculation of normal value, thereby inflating dumping margins, in violation of Article 2.1 of the AD Agreement.[27] The Appellate Body affirmed the Panel's finding, stating that

> If a Member elects to adopt general rules to prevent distortion of normal value through sales between affiliates, those rules must reflect, even-handedly, the fact that both high and low-priced sales between affiliates might not be "in the ordinary course of trade."[28]

[27] WT/DS184/R, para. 7.112. *See also* WT/DS184/AB/R, para. 136, *quoting* WT/DS184/R, para. 7.112 ("[T]he Panel indicated that its view was 'reinforce[d]' by the fact that the 99.5 percent test excludes low-priced home market sales and therefore, 'skew[s] the normal value upward.'"); id., para. 144 ("We observe that the *inclusion of lower*-priced transactions, between affiliates, in the calculation of *normal value* would result in a *lower* normal value, which would make a finding of dumping *less* likely, and would also *lower* the amount of any margin of dumping, all to the *advantage* of the exporter. Conversely, the *inclusion* of *higher*-priced transaction in the calculation of normal value would result in a *higher* normal value, which would make a finding of dumping *more* likely and would also *raise* the amount of any margin of dumping, all to the *disadvantage* of the exporter.") (Emphasis in original).

[28] WT/DS184/AB/R, para. 148. The Panel also made a similar finding: "There is no reason to suppose, and the United States has not proposed any, that affiliation only results in sales that are outside the ordinary course of trade because they are *lower* priced on average than sales to unaffiliated customers. . . . [P]rices might, on average, be *higher* than prices to unaffiliated customers, but would not be caught by the USDOC's 'arm length' test." WT/DS184/R, para. 7.110.

The Appellate Body reasoned that all sales that the DOC designated by way of its "arm's length" methodology as not in the ordinary course of trade do not provide a proper basis for the calculation of normal value:

> [T]he duties of investigating authorities, under Article 2.1 of the Anti-Dumping Agreement, are precisely the same, whether the sales price is higher or lower than the "ordinary course" price, and irrespective of the reason why the transaction is not in the ordinary course of trade. Investigating authorities must exclude, from the calculation of normal value, all sales which are not made in the ordinary course of trade. To include such sales in the calculation, whether the price is high or low, would distort what is defined as "*normal* value."[29]

The Appellate Body recommended that the United States modify its practice regarding ordinary course of trade sales to exclude both low and high price sales that are not in the ordinary course of trade: "Sales between affiliates may result in prices that are either higher or lower than the 'ordinary course' price, and *both* may distort normal value."[30]

2. Findings by the Appellate Body on Other Issues

In addition to the "ordinary course of trade" issue, the Appellate Body found other inconsistencies in the U.S. antidumping practices. The Appellate Body recommended that the United States make *inter alia* the following changes:

- Calculation of the "all others" rate after removing the requirement that the "all others rate" exclude only those margins based "entirely" on the facts available.

- Modification of the application of the captive production provision (*i.e.*, Section 771(7)(C)(iv) of the Tariff Act of 1930, as amended) in the U.S. International Trade Commission's determination of injury to the U.S. domestic industry.

B. Partial Implementation of Appellate Body's Ruling and Outstanding Issues

The United States and Japan were unable to agree on a schedule for the implementation of the Appellate Body's recommendations. On February 19, 2002, the Rule 21.3(c) arbitrator decided that November 23, 2002 was the "reasonable period of time" for implementation of the recommendations and rulings of the Panel and Appellate Body.[31]

---

[29] WT/DS184/AB/R, para. 145.

[30] WT/DS184/AB/R, para. 157 (Emphasis in original).

[31] WT/DS184/13, Arbitration Under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, (Feb. 19, 2002) (The United States argued that a period of eighteen months,

1. DOC's Modification of the Arm's Length Test

On August 15, 2002, the DOC proposed a modification of its arm's length rule and solicited public comments.[32] After receiving and analyzing numerous comments, the DOC decided to implement its proposed modification with only a minor change and published its decision on November 15, 2002.[33] Under the modified arm's length test, the DOC will include comparison market sales by the exporter or producer to affiliates in the normal value calculation provided that the average sales price falls within a range above or below the sales prices of the same or comparable merchandise sold by the exporter or producer to all unaffiliated customers. The DOC now will uses prices of sales to affiliates that are between 98 to 102 percent, inclusive, of the prices to unaffiliated producers. The DOC explained that the new test meets the standards established in the Appellate Body's ruling:

> This new test is consistent with the view, expressed by the WTO Appellate Body, that rules aimed at preventing the distortion of normal value through sales between affiliates should reflect, "even-handedly," that "both high and low-priced sales between affiliates might not be 'in the ordinary course of trade.'"[34]

2. Implementation Timeline

The DOC has asked the United States Trade Representative (USTR) to set a date for the DOC to implement the modified arm's length test to merchandise subject to the DOC antidumping order in *Hot-Rolled Steel from Japan*. From the date set by USTR, the DOC will apply the modified arm's length test to all unliquidated entries covered by the *Hot-Rolled Steel from Japan* antidumping order and will set new cash deposit rates for all producers subject to that order. The DOC will apply the new test in all investigations and administrative reviews initiated on or after November 23, 2002.

3 Unresolved Issues

The DOC's modification of its arm's length test does not address the other inconsistencies identified by the Panel and Appellate Body in their *Hot-Rolled Steel Products* recommendations. In order to create additional time to respond to the remaining issues, the United States on November 22, 2002 requested that the DSB extend the "reasonable period of time for implementation" of the panel and appellate body rulings from November 23, 2002 until

---

expiring on February 23, 2003, would be a reasonable period of time, while Japan insisted that the United States could implement all necessary amendments within ten months, *i.e.*, June 23, 2002.).

[32] *See* Request for Public Comment Pursuant to Section 129(g)(1)(C) of the Uruguay Round Agreements Act, 67 Fed. Reg. 53,339 (Aug. 15, 2002).

[33] Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade, 67 Fed. Reg. 69,186 (Nov. 15, 2002).

[34] Id.

December 31, 2003.[35] Modification of the remaining issues will require a formal act of Congress. The December 31, 2003 deadline corresponds to the date of adjournment of the first session of the next Congress. The United States has engaged Japan in consultations about this requested extension.

OUTLOOK

The modified DOC test for arm's length transaction addresses the Appellate Body's concerns about "even-handedness. The new test does not address concerns about whether a bright-line test is appropriate for the determination of sales in the ordinary course of trade. Although the Appellate Body focused its analysis on whether the DOC's prior practice was balanced, it referred in passing to problems with a bright-line test:

> Moreover, the USDOC *systematically* tests for low-priced sales and it *assumes* that sales below the 0.5 percent downward range are *not* "in the ordinary course of trade." Under the current practice, applied by USDOC in this case, exporters have *no right* to demonstrate that such sales are, in fact, made "in the ordinary course of trade."[36]

There might, for example, exist sales below the 98/102 percent thresholds that are in fact within the ordinary course of trade. A bright-line test does not address such concerns. In the Federal Register notice announcing the modified test, however, the DOC stated that it might consider exceptions on a case-by-case basis[37]:

> [A]s with other aspects of the Department's dumping analysis, parties have a right to submit comments on the record of a proceeding regarding the adjustments that must be made under the statute in order to ensure a fair comparison. We will consider any comments submitted regarding case-specific adjustments made in the arm's-length analysis in that light.[38]

Until the DOC actually applies the new standard, the level of flexibility in and the practical effect of the DOC's new test will be unclear.

Unlike the arm's length test, which was modified through an administrative procedure, changes to the requirements in the calculation of the "all others" rate requires an act of Congress. The extension request for the "reasonable period of time" for implementation by the USTR, a potential extension of more than thirteen months from the original fifteen-month period,

---

[35] Request for Modification of the Reasonable Period of Time, WT/DS184/16 (Nov. 25, 2002).

[36] WT/DS184/AB/R, para. 152 (Emphasis in original).

[37] The DOC also stated that it would make adjustment for other factors, including level of trade and sales volume.

[38] 67 Fed. Reg. 69,186.

highlights the inability of Congress to react quickly to WTO panel decisions regarding U.S. antidumping law. Given the current political climate with a closely divided House and Senate and the politically charged nature of the antidumping law, it will be difficult for Congress to make the amendments necessary to implement the Appellate Body's ruling in the near term.

Proposals by Japan and Mexico in the Context of the Review of the WTO Dispute Settlement Understanding

SUMMARY

Japan and Mexico have submitted new proposals for the revision of the WTO's dispute settlement system, in the context of the review of the Dispute Settlement Understanding ("DSU") which is to be completed by May 2003 for submission to the Fifth Ministerial Conference in Cancun, Mexico, in September 2003.

The main issues treated in the Mexican submission are:

- earlier Article 22.7 determinations of the level of nullification and impairment;
- retroactive application of compensation for nullification and impairment;
- provisional remedies for damage that would be difficult to repair during the course of the dispute settlement process either in the form of the suspension of the measure in question or authorization to allow the complaining Member to take actions to nullify the injurious effects of the measure in question; and
- negotiable remedies by which a Member that prevails in its challenge of another Member's WTO-inconsistent measures may trade for value its remedy (*e.g.*, authorization to suspend obligations) to a third Member that in turn would suspend its obligations against the Member found to have violated a WTO Agreement.

Japan's submission also focus on remedies:

- determinations of level of impairment or nullification that reflect the potential level of damage, rather that just the actual damage caused by the inconsistent measure;
- tougher remedies for abuses of "discretionary law";
- flexibility in the number of Appellate Body members; and
- increased public access to submission in DS proceedings.

ANALYSIS

I. Background on Latest DSU Proposals

In the context of the review of the WTO Dispute Settlement Understanding ("DSU"), as mandated by the Doha Ministerial Conference, Japan [39] and Mexico [40] recently submitted proposals on various DSU procedural and substantive matters.

Under the Doha Ministerial Conference mandate, the DSB must submit its proposals on the DSU reform to the WTO Ministerial Conference in Cancun, Mexico, in September 2003.

II. Proposals by Mexico

Mexico's proposals focus on the remedies available to successful complainants in DSU proceedings. The proposals point out procedural gaps in the current DSU that allow Members to maintain WTO-inconsistent measures for years. Under the current system, Mexico estimates that WTO Members adversely affected by the inconsistent measures on average do not receive compensation and/or are not able to suspend concessions for more than three years from the establishment of a dispute settlement panel. Mexico estimates the average amount lost by successful complainants due only to the time between panel establishment and the receipt of compensation or suspension of concessions to range from US $370 million to $2,049 million.[41]

If adopted, the Mexican proposals would provide incentives to Members to bring complaints to the DSB. The proposals would allow Members that have chosen not to bring complaints because of a perceived inability to use the threat of suspension of concessions to initiate dispute proceedings. The proposals also would expose Members to significant potential liability due to the retrospective application of remedies (*e.g.*, as far back as the date of the imposition of the inconsistent measure).

A. Early Determination of Nullification and Impairment

Mexico proposes that DS Panels combine determinations of the level of nullification or impairment currently set forth in DSU Article 22.7 with their interim report. The simultaneous determination regarding level of nullification or impairment will minimize the delay in the current structure whereby complainants are not authorized to suspend concessions until after the adoption of final Panel reports and the subsequent Panel determinations regarding consistency of the measures taken by the Member to implement the Panel's final report under DSU Article 21.5.

---

[39] TN/DS/W/22, Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding: Proposal by Japan, 28 October 2002.

[40] TN/DS/W/23, Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding: Proposal by Mexico, 4 November 2002.

[41] The higher amount includes the results from the US – FSC proceeding (DS108).

By incorporating the Article 22.7 process into the Panel's successful complainant Members could initiate arbitration proceedings upon the release of the Panel's interim report. According to Mexico, the benefits of its proposal include

- prompter compliance with Panel decisions because Members found to be in violation of their WTO obligations would be subject to payment of compensation or suspension of benefits from the date of the adoption of the final Panel or Appellate Body report;

- added incentive for Members to negotiate at an earlier stage because the Panel would inform the Members of the level of nullification or impairment prior to the adoption of the final Panel report;

- reduction of the time during which an illegal measure could be maintained without consequence; and

- greater administrative efficiency (*e.g.*, better use of time after the issuance of interim Panel reports, diminish the need to reconvene Panels or find new Panels/arbitrators to review level of nullification or impairment under Articles 21.5 and 22.7)

Mexico recommends certain procedural safeguards on the proposed Panel determination on level of nullification or impairment: review by the Appellate Body and confidential treatment of Panel determination on level of nullification or impairment until after the issuance of the Appellate Body Report.

B. Retroactive Application of Compensation for Nullification or Impairment

Mexico argues that the current prospective DSU compensation system does not compensate aggrieved Members for the losses they suffer due to the inconsistent measures of other Members prior to and during the DS proceedings. Citing to general principles of state responsibility and international law, Mexico proposes modifications to the DSU that would "eliminat[e], as far as possible, . . . all of the consequences of the illegal act, and restor[e] . . . the situation which would, in all probability, have existed had the act not been committed." Under the Mexican proposal, Members that have prevailed in their DSU challenges against WTO-inconsistent measures of other Members would receive retroactive calculations of the level of nullification or impairment. Based on this calculation, aggrieved Members would have a right to negotiate and receive compensation for all of the losses suffered as a result of the illegal measure or suspend benefits equivalent to the losses.

Mexico proposes three dates to start the period for the calculation of nullification or impairment:

(1) the date of the imposition of the measure;

(2) the date of the request for consultations; or

(3) the date of the establishment of the Panel.

In addition to providing fairer compensation, Mexico believes that its proposed retroactive system would eliminate the incentive that respondent Members have to delay or extend DS proceedings for strategic reasons (*e.g.*, delaying the establishment of a Panel until the second DSB meeting, frivolous appeals to the Appellate Body) and encourage negotiations between Members.

Mexico's proposal for the retrospective application of damages likely will encounter strong resistance. The main concerns are 1) that the DSU was intended to be used as a means of correcting inconsistencies, not as a court that assesses liability for past acts, and 2) that retrospective damages would expose all Members to uncertain and potentially unlimited liability.

In addition to modifying the period for the calculation of nullification or impairment, Mexico proposes that the Panel award legal fees and litigation costs incurred during the Panel proceeding be added to the calculation of the amount of the nullification or impairment.

C. Preventative Measures

Mexico also proposes a revision to the DSU that would address situations where the DSU does not protect Members against measures that cause damage that is difficult to repair. In exceptional situations, Mexico believes that aggrieved Members should be able 1) to cause the challenged measure to be suspended while the dispute is pending at the DSB or 2) to take "preventative measures" akin to the provisional measures provided for in Article 7 of the Agreement on the Implementation of Article VI of the GATT 1994 (the Antidumping Agreement) and Article 17.1 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement)[42]. Mexico also cites general principles of domestic and international law for support of its position that the DSU should incorporate a "preventative measure" remedy that would protect against damage that is difficult to repair.

Mexico proposes a provision that would allow DSB complainants to ask the Panel to request that the defending Member suspend the application of the challenged measure for a certain period. If the defending Member does not agree, the Mexican proposal would permit the Panel to authorize the complaining Member to take measures during the duration of the proceedings to prevent the damage that would be difficult to repair. The proposal would require the complaining Member to compensate the defending Member if the final Panel determination does not find a WTO inconsistency or determines that the level of inconsistency is lower than that used in the preventative measure.

[42] Mexico points out that the Antidumping Agreement and SCM Agreement contain provisions allowing for the application of provisional measures when "the authorities concerned judge such [provisional] measures necessary to prevent injury being caused during the investigation." The Agreement on Textiles and Clothing (Article 6.11), the Agreement on the Application of Sanitary and Phytosanitary Measures (Annex B), the Agreement on Technical Barriers to Trade (Articles 2.10, 2.12, 5.7, 5.9 and Annex 3), the Agreement on Trade-Related Aspects of Intellectual Property Rights (Article 31(b) and Part III, Section 3) and the Agreement on Safeguards (Article 6) also provide for provisional measures to eliminate immediate injury.

D. Negotiable Remedies

The final Mexican proposal recognizes that complaining Members that have been permitted to suspend concessions against defending Members might not be able to do so without affecting their own interests. Mexico proposes that the remedies authorized at the DSB be treated as "negotiable remedies" that can be transferred to other Members. In instances where it would be difficult for a complaining Member to suspend concession, Mexico believes that the Member should be able to negotiate with other Members who have the capacity to suspend concessions against the infringing Member. The complaining Member would receive benefits (*e.g.*, cash compensation, other mutually agreed benefits) from the other Member, who in turn would suspend concessions against the infringing Member. By trading the right to suspend concessions for other benefits, the complaining Member would be able either 1) to obtain compensation that otherwise would be not available or 2) to improve its bargaining position vis à vis the defending Member because the defending Member would face a "more realistic possibility" of being the subject of suspended concessions.

III. Proposals by Japan

A. Resubmission of November 2001 Joint Proposal

Japan resubmitted a November 1, 2001 joint proposal by Bolivia, Canada, Chile, Columbia, Costa Rica, Ecuador, Japan, Korea, New Zealand, Norway, Peru, Switzerland, Uruguay, and Venezuela.[43] The joint proposal, which was submitted to the Doha Ministerial Conference, includes proposed revisions regarding sequencing, timeframe of disputes, third party rights, and S&D. The resubmitted joint proposal reflects certain revisions from the November 2001 joint proposal to reflect post-Doha discussions.

B. New Proposals

Japan also submitted four new proposals for DSU reform.

1. True "Equivalence" Between the Levels of the Suspension of Concessions and of the Nullification and Impairment Caused by a WTO-Inconsistent "Mandatory Law"

Japan believes that the current method of assessing the level of nullification or impairment does not capture the true amount of the potential effect of the nullification or impairment in cases where the inconsistent measure is a "mandatory law" (*i.e.*, a law that mandates the WTO Member to apply WTO-inconsistent measures). Under the current practice of using the actually generated trade distorting effects of a WTO inconsistent measure to quantify the level of nullification or impairment, Japan argues that the authorized remedy does not provide enough incentive for the concerned Member to bring its "mandatory laws" into

[43] WT/MIN(01)/W/6, Amendment of Certain Provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes, 1 November 2001.

conformity with WTO requirements. Therefore, Japan believes that the determination of "level of nullification or impairment" under Article 22.4 should not be limited to the extant trade distorting effect of the inconsistent measure but rather should be adjusted to account for the potential trade distorting effect that the measure might have.

Japan cites the example of a mandatory anti-dumping law that requires the Member to impose antidumping duties that are inconsistent with the Antidumping Agreement. Under the current methodology, the level of nullification or impairment would be only the amount attributable to the decision under the mandatory law (*i.e.*, an antidumping order) related to the particular decision in questions but would not capture similar decisions that might be taken in the future. A retaliatory measure based on only the actually generated trade distorting effects of the decision in question does not provide a sufficient incentive to the Member to amend its "mandatory law" to comply with WTO requirements, Japan argues. In this scenario, "the Member concerned might prefer maintaining the WTO-inconsistent law to complying only to avoid ineffective [piecemeal] retaliations."

To address this problem, Japan proposes that the calculation of the level of impairment or nullification be based not only on the trade effects of the existing measures taken under the "mandatory law" but also those that might be generated by similar subsequent measures that may be taken under the WTO-inconsistent mandatory law.

2. Prevention of the Repeated Application of WTO-Inconsistent Measures Under a "Discretionary Law"

Japan also argues that the DSU should be amended to prevent repeated abuses of "discretionary laws" that allow a Member to choose between WTO-consistent and WTO-inconsistent measures. Under current DSU practice, the Panel will instruct the concerned Member to bring its measure into conformity with WTO requirements but, because the "discretionary law" under which the measure was adopted is not inconsistent on its face with WTO requirements, Panels do not require modification of the "discretionary law." Japan states that this creates a loophole for potential abuses and does not discourage "hit and run" tactics in which Members repeatedly will take actions under the "discretionary law" that are inconsistent with WTO norms.

Japan proposes two solutions to close off this loophole. First, in instances where the repetition of the same violation under the "discretionary law" is "highly probable," the Panel or the Appellate Body should be able to find that the "discretionary law" itself is inconsistent with WTO requirements and should be able to recommend that necessary steps be taken to prevent the repetition of the WTO-inconsistent measures.[44]

Second, Japan proposes an alternative solution by shifting the burden of proof from complainants to defending Members in instances where a Panel already has found a measure

[44] Japan advocates a flexible approach to ensuring that measures taken under "discretionary laws" comply with WTO requirements (*e.g.*, administrative guidelines preventing the recurrence of WTO inconsistencies).

under the particular "discretionary law" to be WTO-inconsistent. Under this approach, where a Panel has found a measure under a "discretionary law" to be WTO-inconsistent, a subsequent Panel would presume that a similar measure taken under the particular "discretionary law" also is inconsistent. The defending Member, and not the complaining Member, would bear the burden of proof that the similar measure is consistent with WTO requirements. Japan proposes expedited proceedings in cases of challenges to similar measures under a particular "discretionary law" and that, upon finding a violation, Panels recommend that the respondent Member prevent future repetitions of WTO-inconsistent measures.

Japan believes that the "discretionary law" issue may be addressed either by an amendment to the DSU or by decisions in another forum (*e.g.*, the adoption of an authoritative interpretation on Article XVI:4 of the Marrakesh Agreement Establishing the WTO in accordance with Article IX:2 thereof).

3. Flexibility in the Number of Appellate Body Members

Citing the increased volume and legal complexity of Appellate Body proceedings, Japan calls for an amendment to DSU Article 17.1 to allow modification to the number of Appellate Body members through a decision of the DSB or General Council, rather than repeated amendments to Article 17.1 to increase or decrease the number of Appellate Body members.

4. Access to Submissions

To assist other Members with in other dispute proceedings and to improve transparency, Japan recommends amending the DSU to require that submissions of parties and third parties, except for confidential information, be made accessible to all Members and the public within two weeks from the date of each meeting of a panel or oral hearing of the Appellate Body.

OUTLOOK

As discussed in the September 2002 WTO Report, the large number of proposals submitted in the DSU review likely will make it impossible to meet the May 2003 deadline. Aggressive proposals, such as those by Japan and Mexico, that would expand the level of penalties that a Member might may meet significant resistance from the United States and other Members.

Japan's procedural and administrative proposals (*i.e.*, greater access to submissions and flexibility in the number of Appellate Body members) will be more tolerable to most Members.

REGIONAL TRADE AGREEMENTS

US and Australia Agree to Negotiate FTA

SUMMARY

Yesterday, the United States Trade Representative (USTR) Robert Zoellick announced that the Administration has notified the U.S. Congress of its plans to launch free trade agreement (FTA) negotiations with Australia. Zoellick made the announcement in Canberra, Australia, after meeting with the Australian Prime Minister John Howard and the Trade Minister Mark Vaile. The negotiations are scheduled to begin in mid February.

Some agricultural businesses in the U.S. oppose the FTA and expressed "strong reservation against this course of action." They stressed that an FTA with Australia would bring "no net benefit" to the U.S. and would disadvantage U.S. agriculture producers.

ANALYSIS

Background

For nearly two years government and businesses officials on both sides of the Pacific have advocated on numerous occasions the importance of an FTA between the U.S. and Australia. They have indicated that Australia is one the most important trade partners for the U.S. due to the size of its economy, its strategic position in the Asia-Pacific Region and its indispensable role in the future economic life of this region. They have further pointed out the existing interest from U.S. businesses to invest and even settle their headquarters in Australia.

The Australian government too has pressured the U.S Administration to clarify its intentions to proceed with future negotiations for an FTA between the two countries. Despite rhetoric from the Administration to explore such an opportunity, Bush had not taken a firm position on the issue. A White House report to the Congress, released on September 20, however asserted that an FTA with Australia was among the priorities of U.S. trade policy. In a speech in early October, USTR Zoellick further announced that the U.S. would seek to promote "security and new business networks" by pursuing FTAs with Morocco and "possibly" Australia.

US Outlines Specific Objectives of US-Australia FTA

In the letter to Congress the Bush Administration outlined its specific objectives for the FTA negotiations with Australia. The letter indicated that, among other things, the U.S. would seek to negotiate:

- Rules of origins and procedures for their applications, which would ensure that only eligible goods will benefit from the preferential duty rates under the FTA,

- Enhanced protection of intellectual property rights in Australia, which would go beyond TRIPS in some new areas of technology,

- High levels of protection of patent and undisclosed data in Australia, in line with those provided under the U.S. laws,

- Reduction of discriminatory and other trade barriers to trade in services and enhanced market access for U.S. services businesses in Australia

- Establishment of a bilateral safeguard mechanism during the transition period

- No changes to the U.S. trade remedy laws,

- Australia's commitment on the proper enforcement of its labor laws

- Australia's commitment on the proper enforcement of its environmental laws

The complete list of U.S. objectives is contained in Zoellick's letter to Congress, which we have attached to this report.

Benefits of a U.S.-Australia FTA

According to trade sources, the conclusion of a U.S.-Australia FTA would bring considerable benefits to both sides of the Pacific. Besides reducing trade barriers and boosting trade relations in general, the conclusion of an FTA is expected to achieve the following goals:

- Help the U.S. and Australia to reassess their alliance and contribute to security and stability in East Asia and the Pacific;

- Boost investments, thus positively affecting employment and productivity;

- Improve integration and cooperation efforts in R&D, product development, IT development, and research;

- Enhance "competitive liberalization." This will facilitate other trade negotiations, particularly those at the WTO level; and

- Improve business integration.

Agriculture Issues Will Complicate Negotiations

One of the most significant hurdles on the road to the FTA is expected to be agriculture. Many U.S. agricultural producers strongly oppose the FTA and have indicated in the past that they would attempt to stymie the negotiations. U.S. agricultural businesses object to the

Australian "excessively restrictive" health and safety measures, which block access of U.S. agricultural exports to the domestic market. The U.S. companies allege that Australia already has broad access to the U.S. market, and at the same time, limits market access for U.S. agricultural products by imposing severe sanitary and phytosanitary (SPS) measures that are almost impossible to meet.

U.S. agricultural groups insist that the U.S. should negotiate agricultural issues in the WTO context instead of at the bilateral or regional level, arguing that the U.S. will have more leverage to negotiate at the multilateral level.

During the past several days, various organizations representing U.S. agricultural producers have formed two coalitions.

- The first, including the National Cattlemen's Beef Association, the National Renderer's Association and the National Turkey Federation together with the National Farmers Union expressed their "strong reservations about this course of action" and advised the Administration to proceed "with the utmost caution."

- U.S. businesses in the second group, led by the American Farm Bureau Federation said they would support the initiation of FTA negotiations, but reserved their right not to accept the final text of the FTA.

Both coalitions however made it clear that unless Australia is willing to make considerable concessions regarding its SPS requirements, they will oppose the continuation of the FTA negotiations.

Australian government leaders believe that despite the controversy, there is a good chance that both sides can reach an agreement. They note that both parties should offer concessions in the negotiations and reminded the U.S. government that the U.S. Farm Bill has harmed agricultural producers in Australian by increasing the amount of domestic support to U.S. farmers. They stated that the Australian agricultural system has been challenged only once at the WTO and that the WTO's Dispute Settlement Body found almost all of the legislation in question to be consistent with WTO rules.

OUTLOOK

Rumors of a U.S.-Australia FTA have been circulating for years, so analysts are not surprised that the U.S. finally agreed to initiate negotiations. Australia's support for U.S. security policies in the region likely was a key factor in the U.S. decision to begin negotiations. The FTA also serves to strengthen the U.S. strategy of using bilateral and regional agreements as "building blocks" to provide momentum for the multilateral WTO negotiations.

However, the FTA faces challenges, including strong skepticism from U.S. agriculture groups and the fact that the U.S. already is negotiating FTAs with numerous other countries. Many analysts are concerned that USTR does not have enough resources to negotiate the

numerous FTAs in an effective and timely manner. The simultaneous negotiation of various FTAs could slow progress on the U.S.-Australia FTA.

Australian officials expressed concern that the 2004 presidential election could hinder FTA negotiations. It is unclear whether the next administration will be Republican or Democratic. Therefore, U.S. FTA partners are unsure whether trade policy will remain the same or if a Democratic administration would insist on different provisions in the FTAs, for example on labor and environment. In addition, if a Democrat assumes office, then negotiations could be delayed while a new economic team is put in place.

USTR Briefs Business Community on U.S.-Singapore FTA

SUMMARY

USTR officials at a recent meting indicated that one balance of payments ("BOP") issue with Singapore is a significant issue and it could block conclusion of the U.S.-Singapore Free Trade Agreement (FTA). Singapore has asked for an exception in the free transfers article of the FTA investment chapter. Singapore wants to maintain the right to impose controls on capital accounts and current account transactions in times of economic crises.

The U.S. business community remains divided on the issue. Some representatives argue that it is essential the FTA ensure that Singapore does not restrict capital outflows in times of economic crises because of the precedent the U.S.-Singapore FTA could set for future FTAs.

Other representatives argue that currently Singapore has the right to restrict capital outflows and the failure to conclude an FTA will not change the situation.

ANALYSIS

Ives Discusses Status of U.S.-Singapore Agreement

Ralph Ives, Assistant USTR for South East Asia and the Pacific, noted the following regarding the current status of the U.S.-Singapore FTA:

- USTR is not "trying to hide the ball" by not releasing the text of the FTA to the public. USTR wants to confirm that the language in the text reflects the agreements between the negotiators before USTR makes the text public. This process likely will take a couple of weeks, especially given that USTR is focusing on the upcoming U.S.-Chile FTA negotiations.

- Although Zoellick has not approved a specific timeline, Ives expects USTR to notify Congress early in 2003, at which time USTR will release the text of the FTA to Congress. Ives indicated that he expects the text will be made public when Congress receives it. Congress has 90 days to review the text before the Administration signs the FTA. Therefore, the US and Singapore likely would sign the FTA in early April.

- The text still must undergo a "legal scrub," which will involve communication between lawyers and negotiators to ensure the accuracy of the language contained in the text. Given that the text is over 300 pages and the annexes are approximately another 800 pages, this "legal scrub" will take time.

- Early next week USTR will release the highlights of the FTA. Ives noted the following FTA highlights during the meeting:

  - Liberalization of the banking and insurance markets.

- A services agreement based on a negative list approach.
- Good general transparency provisions.
- Depending on the outcome of the outstanding BOP issue, important investment provisions.
- Advances in intellectual property rights, including provisions on copyrighting and new technologies.
- Good e-commerce provisions that could be used as models in the WTO.
- Additional government procurement commitments. Both Singapore and the US are signatories to the WTO Agreement on Government Procurement.
- Enhanced customs cooperation procedures.
- By 2005, Singapore will adopt a business competition law.
- Preservation of NAFTA rules of origin for textiles and apparel.
- Simplified rules of origin.
- An anti-corruption statement as part of the text of the FTA.
- Labor and environmental provisions that almost exactly follow the wording in Trade Promotion Authority (TPA). The language in the FTA encourages parties to handle labor and environmental disputes by discussing the dispute and resolving it on their own. There is a panel process for disputes that cannot be settled by the parties, and the FTA establishes a system of fines for violations. The cap for the fines has not been set. USTR hopes to set the cap within the scope of the U.S.-Chile FTA.

Padilla Says "Premature" to Discuss Lobbying Efforts; BOP Issue Could Block Conclusion of FTA

Chris Padilla, Assistant USTR for Intergovernmental Affairs and Public Liaison, indicated that it is premature to begin a Congressional lobbying campaign because it is not clear that there will be an agreement. Although there is only one outstanding issue, it is a significant issue. Ives agreed with Padilla, adding that he is very concerned about the BOP issue.

BOP Issues

An official from the Department of Treasury ("DOT") explained that there are three BOP issues.

GATS and GATT Rights: Two issues involve Singapore wanting to preserve rights under the GATS and the GATT. Under GATS (General Agreement on Trade in Services), there is a Balance of Payment exception to permit measures in services that are inconsistent with the free transfers provisions of the U.S. proposed investment text. The GATT (General Agreement on Tariffs and Trade) also permits countries to restrict trade in goods for balance of payments reasons. The DOT official and Ives commented that these issues are resolvable.

Transfer of Capital: The third and most difficult issue is the issue of whether Singapore will be allowed to maintain its rights to restrict capital outflows in times of economic crises. This third issue has been the most widely publicized and is the one analysts seem to refer to when discussing the "the BOP issue." Currently, IMF commitments allow countries the right to restrict capital outflows. The DOT official commented that Singapore understands the need for capital outflows the most and needs it the least, but nevertheless it is a sticking point.

Singapore Could Restrict Capital Controls in Future

Business representatives, the DOT official and the USTR officials all acknowledged that nobody expects Singapore to exercise its right to restrict capital outflows, at least under the current political regime. However, it could be problematic for U.S. businesses in the future if Singapore decided to exercise the right.

FTA Should Set Precedent for Future Agreements

Even more important to U.S. businesses at the meeting is the precedent that the U.S.-Singapore FTA could set for future agreements. Businesses questioned what would happen with other FTA partners, such as Chile and Central America, who are more likely to exercise the right to restrict capital outflows, if the US could not ensure the free transfer of capital with a country like Singapore that has a developed financial sector. Other FTA partners, some business representatives argue, will look at the Singapore FTA and see that the US did not make Singapore commit to these types of provisions.

Ives responded by questioning how many countries would want to negotiate FTAs with the US if the US does not "get this issue right" in the Singapore FTA, meaning that other FTA partners could resist the restrictions and decide that an FTA is not worth making these kinds of commitments.

Failure to Conclude FTA Will Not Prevent Singapore From Restricting Future Capital Flows

Ives noted that if there is no FTA, Singapore still would maintain its current right to restrict capital outflows.

Some U.S. business representatives at the meeting added that U.S. businesses already have factored in the issue of capital transfers when conducting the risk assessment before investing in Singapore in the first place. Therefore, the BOP issue is not worth sacrificing the entire FTA.

U.S. Agencies Disagree on BOP Issue

The DOT and USTR seem to disagree on how to handle the issue of capital transfers in the FTA. Padilla noted that, in USTR's view, if the proponents of the BOP provision in the business community stick to their position, then there will be no FTA. DOT seems to be taking a stronger position on the issue.

USTR Official Suggests Alternative Course of Action

Padilla suggested that one alternative to dealing with the BOP issue is to strip the FTA of the investment chapter and negotiate a separate Bilateral Investment Treaty (BIT). However, this suggestion was not well received by the business representatives present at the meeting. In addition, the DOT official noted that such a strategy would be problematic, given the crossover between investment and services. Specifically, most services must have a commercial presence in a foreign country, which means many service sectors have investments in the foreign country.

Current Status of BOP Dispute

Ives noted that Singapore has proposed solutions to DOT that commit Singapore to go beyond their IMF commitments, but the DOT has not accepted the proposals. Singapore has never invoked its right to restrict capital transfers abroad, but it could easily do so under the IMF guidelines.

Currently, the DOT and their Singaporean counterparts are conducting high-level talks to resolve the BOP issue.

Negotiators Reach Agreement on Chewing Gum

One representative asked about concerns that people would need a prescription to buy chewing gum. Ives said that Singapore was not willing to lift the ban on chewing gum, even after high-level discussions with Zoellick. The question Singapore wrestled with is how to regulate chewing gum. The solution was that Singapore would allow the sale of gum if it was for therapeutic reasons. Wrigley's, Ives noted, argued that chewing gum has certain health benefits. Ives added that this is the "first step" Singapore has taken and "we'll see if there is a second step." The representative asked if Ives foresees any further movement on the issue in the context of the FTA and Ives responded, "no."

OUTLOOK

Business representatives and the USTR officials commented on the importance of concluding the pending Chile and Singapore FTAs so that the limited USTR resources could be redirected to other trade priorities. Padilla noted that Ives will be the lead negotiator for the U.S.-Australia FTA, and Regina Vargo, who is the lead negotiator for the U.S.-Chile FTA, also will be lead negotiator for the U.S.-Central America FTA. Therefore, these negotiators, he concluded, will "be off doing other things soon."

US Hopes to Conclude FTA with Chile Despite Outstanding Issues; Chile Signals It Will Only Sign an Agreement It Deems Beneficial

SUMMARY

The Chilean Government is moving forward with its trade policy to conclude free trade agreements (FTAs) with its most important trade partners, the European Union (EU), the United States, and Japan. On November 18, 2002, Chile signed an FTA with the EU. Analysts expect the negotiations for the U.S.-Chile FTA to be concluded before the end of this year, possibly in the current round already underway in Washington. Despite these positive predictions, officials admit that numerous outstanding issues remain to be resolved.

The only major trade partner with which Chile has not been able to launch FTA negotiations is Japan, as the Japanese Government has not yet expressed its willingness in this regard.

ANALYSIS

The Chilean Government is moving forward with its trade policy to conclude free trade agreements (FTAs) with its most important trade partners, the European Union (EU), the United States, and Japan. On November 18, 2002, Chile signed an FTA with the EU *(Please see related report this edition).*

Negotiations are currently underway in Washington for the U.S.-Chile FTA, which analysts expect will be concluded before the end of this year, possibly in the current round. Nonetheless, numerous outstanding issues remain to be resolved.

The only major trade partner with which Chile has not been able to launch FTA negotiations is Japan, as the Japanese Government has not yet expressed its willingness in this regard.

Chilean and U.S. Negotiators Intensify Their Work in Lead-up to Fifteenth Round of Negotiations

Chilean and U.S. negotiators agreed to hold a series of meetings and video conferences before the fifteenth round of FTA negotiations, which commenced on December 2, 2002, in Washington, DC. The purpose of these meetings and conferences was to advance as far as possible in the most sensitive areas of the negotiations, including market access for agricultural products, enforcement of labor and environment provisions, financial services, telecommunications, and intellectual property rights, in preparation for the fifteenth round.

Officials Express Hope that Agreement Can Be Concluded in Current Round

Chilean negotiators have said that their will is to finish the negotiations during the fifteenth round, although they are conscious that there are still some sensitive issues pending.

The Government announced that it would send the Minister of Finance and the Minister of Foreign Relations to Washington for the fifteenth round.

In related developments, Osvaldo Rosales, Head of the Ministry of Foreign Relations Economic Relations Office (DIRECON), expressed his optimism in relation to the conclusion of the FTA negotiations between the US and Singapore, as he considers it a sign of the U.S. commitment to fulfill its free trade agenda, which includes the FTA with Chile. Analysts emphasize that several outstanding issues regarding balance of payments and capital controls remain unresolved in the context of the U.S.-Singapore FTA negotiations. Reportedly, the U.S.-Chile negotiations have hit a similar snag regarding capital controls.

U.S. officials also hope to conclude negotiations in the current round. In addition to the unresolved issues mentioned above, U.S. services industries have expressed significant concerns that Chile's proposed exceptions in the services chapter could negate the principle of a negative list approach. It is unclear if and how U.S. negotiators will deal with these concerns in the current round.

Chilean Government Will Only Sign an Agreement It Deems Beneficial

In the last few days, members of the Chilean Congress from all political parties as well as other interest groups have expressed concerns that the U.S. offers to Chile are clearly insufficient, especially with regard to agriculture and financial services, and that Chile should not conclude the negotiations in the current round.

Reportedly, some politicians have called the agreement "inferior" to the recently signed EU-Chile agreement *(Please see related report this edition).* The politicians have been particularly critical of the U.S. offers on agricultural market access, with one politician reportedly calling them "simply ridiculous." The Chilean Government has stated that it will not sign an FTA that is not beneficial for Chile.

OUTLOOK

The current round of negotiations has been extended by several days so that negotiators can reach agreement on the remaining outstanding issues, including intellectual property, services, and dispute settlement, among others. The Chilean press has reported that the United States and Chile could reach a final agreement as early as December 10, 2002.

U.S. negotiators have been providing regular briefings for Congressional staff and business leaders, in an effort to begin building bipartisan support for the FTA. The U.S. Chamber of Commerce will begin organizing a U.S.-Chile FTA Business Coalition in the coming weeks.

Conference Explores Benefits of FTAA and Feasibility of 2005 Deadline

SUMMARY

Speakers at a recent conference regarding the Free Trade Area of the Americas (FTAA) were optimistic that the FTAA countries would conclude an agreement by 2005, but questioned what type of agreement would emerge. Analysts have speculated that negotiators will not be able to conclude an ambitious agreement by 2005 and, therefore, would agree to a scaled down version. Other analysts have suggested that the failure of the US and Brazil to agree on sensitive sectors could result in a web of bilateral and regional agreements instead of a hemisphere-wide FTAA.

Panelists at the recent conference reviewed the benefits expected from the FTAA. Latin American and Caribbean countries, among other things, would secure market access provisions currently renewable through U.S. preference programs and further open the U.S. market.

An important issue is how the FTAA will affect the existing bilateral and regional agreements. Clearly Mercosur and other regional groups will have to define their purpose and value in light of a hemisphere wide agreement that, presumably, will go further to liberalize markets. One suggestion raised at the conference is that these regional groups could define their role in the region in terms of "neighborhood issues," such as border issues, that would not be included in the FTAA.

ANALYSIS

On November 21, the Center for Latin American Issues at the George Washington University held a seminar on "Prospects for an FTAA." We summarize the discussion below.

I. Ryckman Discusses U.S. View on FTAA

Regina Vargo, Assistant USTR for the Western Hemisphere, was scheduled to discuss the U.S. perspectives on the FTAA but was unable to attend due to requested consultations with Congress. Therefore, Mary Ryckman, Deputy Assistant U.S. Trade Representative Trade Capacity Building, took Vargo's place.

Ryckman began by outlining the accomplishments announced during the Quito Ministerial. *(Please see W&C November 2002 report).* She commented on the following:

Release of Draft Text

At the previous Buenos Aires FTAA Ministerial, there was some discussion on whether to release the draft text. No objections were raised at the Quito FTAA Ministerial, which exemplifies the change in the attitudes of some governments.

Hemispheric Cooperation Program

Not surprisingly given her role as Deputy Assistant U.S. Trade Representative Trade Capacity Building, Ryckman focused on the Hemispheric Cooperation Program for small economies launched at Quito.

- The program will assist in the implementation of commitments and transition to the global economy. It is very work intensive.

- Countries will prepare national and regional implementation plans, and self-designated donors will help implement the plans.

- There will be roundtable discussions with donors to discuss the plans. These donors are not just government agencies, but include donors from all sectors, including the Inter-American Development Bank (IDB), the Organization of American States (OAS), foundations, and the private sector. The point of the roundtables is to determine how to accomplish goals given the level of funding. The roundtables will help donors organize. For example, one country representative noted that they have had five services seminars and do not need another one.

- There is so much technical assistance available that countries are "falling all over each other." Ryckman emphasized that the Program is a demand-driven strategy and not a supply-driven strategy, meaning that the countries are responsible for developing the plans and presenting them to the donors for funding.

- The short-term goal is to support preparations for the immediate deadlines set in Quito.

Bilaterals and the FTAA

Responding to a question on whether the U.S. bilateral FTAs would facilitate or undermine the FTAA process, Ryckman insisted that the bilaterals would facilitate the process. She noted that the five Central American countries are done with strategizing for the U.S.-Central America FTA negotiations. The US wants the countries now to prioritize and organize their positions and make them public so the private sector can energize the process. Learning how to deal with tariff offers and other negotiating processes in the context of the U.S.-Central America bilateral FTA will provide the five countries with practical experience that can be applied to the FTAA and WTO negotiations.

2005 Deadline

When asked about whether the 2005 deadline is realistic, Ryckman said that she thinks Brazil, as a co-chair of the process, will feel pressure to implement the deadlines set by the 34 Hemispheric Ministers. The 2005 deadline is not impossible. A great deal of work has been

done already. Countries must be willing to make hard political decisions, but nothing occurred in Quito to indicate that countries will not try to comply with the 2005 deadline.

Obstacles to the FTAA Process

Ryckman was asked to list the top three or four obstacles the FTAA process faces. She started by emphasizing the successes, including characterizing the common ground among the 34 countries as "amazing." Each country in the hemisphere, including the small countries are sending their Ministers to the FTAA meetings and committing the required resources.

As for obstacles, the agriculture issue obviously is difficult, but "not insurmountable." Likewise, the small country issue is difficult, but not insurmountable. Ryckman also added that, regarding elections in the FTAA countries, there is always some uncertainty, because when dealing with 34 countries, it is likely that there is an election process going on somewhere in the hemisphere.

II. FTAA Presents Opportunities for Latin American and Caribbean Countries

Robert Devlin, Deputy Manager, Integration and Regional Programs Department, Inter-American Development Bank, discussed the background and current status of the FTAA negotiations. We highlight his comments below.

Why liberalize?

Given that the FTAA involves mostly developing countries, the process will result in an asymmetric liberalization. The U.S. economy, for example, already is relatively open. Therefore, why would Latin American countries want to pursue the FTAA?

Market access: U.S. preference programs are reversible. The FTAA would allow the Latin American countries to "lock in" preferences. Also, the current preference programs involve certain obligations in exchange for the market access benefits.

Dispute settlement: The FTAA would provide clear dispute settlement procedures and greater certainty for trade relations.

Tariff peaks: Tariffs in the US and Canada generally are low, but tariff peaks are problematic. For example, Canada has 98 tariff lines that are subject to duties over 50%, and the US has 51 tariff lines that are subject to duties over 50%. These tariff lines involve a relatively small number of products, but they cover the products in which the Latin American and Caribbean countries have a comparative advantage.

Trade remedy laws: The Latin American countries want to improve procedures for antidumping cases.

Agriculture: The Latin American countries want to remove the market distortions in the agriculture sector.

South-South trade: The FTAA would open trading opportunities between the Latin American and Caribbean countries themselves. Currently, these countries in many cases assess high duties on products traded between each other.

FDI: The FTAA would grant greater certainty to foreign investors, and, therefore, increase Foreign Direct Investment. In addition, the FTAA will "anchor" the FTAA economies, particularly the vulnerable economies, by "locking in" changes and, therefore, decreasing the risk premium.

Guard against trade diversion: The FTAA would decrease the risk of trade diversion arising from differences in preferential tariffs. The hemispheric agreement allows countries to best utilize their comparative advantages by including both developed and developing countries. Therefore, resources would not be diverted to inefficient countries.

Modernize institutions: Countries will be forced to adopt disciplines not specifically included in the FTAA if they want to compete. Therefore, the FTAA will provide an incentive for countries to modernize their institutions.

Non-trade considerations: Finally, the FTAA will lead to deeper cooperation beyond trade issues.

Possible Impacts of an FTAA

Devlin listed the following possible results of an FTAA:

- Increased trade in goods.
- Increased FDI, which likely would begin before the negotiations conclude.
- Increased productivity. The increase in productivity would be greatest in markets that are relatively closed, such as Brazil, since the FTAA mimics the opening of the economy to the world.
- Theoretically, skill gaps would narrow and improve the income distribution problems faced by many Latin American countries. However, the data on improved income distribution effects is ambiguous and, therefore, somewhat controversial.
- Creation of regional disparities. For example, NAFTA created regional disparities in Mexico by improving the economy in the North significantly more than in the South.
- "Clean up" of the web of regional agreements. Presumably, the FTAA will absorb all of the agreements that do not liberalize as much as the FTAA. There are many such "superficial" agreements and, therefore, the conclusion of the FTAA would increase transparency.

- Test the relevancy of the sub-regional agreements. The FTAA will "set the floor" and those agreements that can go deeper than the FTAA will survive, while the agreements that stall due to the FTAA will lose their relevancy.

- Serve as a model for cooperation. For example, the EU began as an economic cooperation agreement and cooperation in other areas ensued.

Countries Will Realize Benefits Only Under Certain Conditions

Devlin stressed that the following issues must be taken into consideration when discussing the benefits of the FTAA:

Balanced agreement: The market access chapters must open markets in sectors in which Latin America has a competitive advantage and secure existing market access provisions.

Comprehensive agreement: The FTAA must involve trade-offs from both sides. This issue is difficult, given the sensitive sectors in each economy.

Political sensitivity: In some cases, smaller economies will incur many costs and receive few benefits. Negotiators need to develop a mechanism to deal with this issue. Are longer phase-out periods sufficient? Also, negotiations on politically sensitive sectors will be difficult.

Capacity issue: Many countries will need to change institutions, laws, etc. Do these countries have the capacity to implement these changes?

Civil society outreach: The governments need open channels of communication with civil society to understand their views during the negotiations and to garner support for passage of the final agreement.

Macroeconomic stability: The macroeconomic stability of the FTAA countries will be important throughout the negotiations.

Economic recovery: It is politically difficult to negotiate an FTAA when the economy is not doing well.

Capacity to reallocate costs: There will be winners and losers in the FTAA process. Losers tend to organize better than winners. Therefore, countries must deal with the losing side of the economy before problems occur.

Parallel negotiations: Countries must identify and exploit synergies from parallel negotiations, such as the U.S.-Chile and U.S.-Central America negotiations. Are these building blocs or stumbling blocs? If negotiators aim to set precedents in these bilateral and regional agreements, then these agreements could be a positive factor in the FTAA process. If negotiators set goals based on mercantilist interests, then these agreements would be a negative factor in the

FTAA process. A "hub and spoke" system of agreements is inefficient. Therefore, the bilateral and regional agreements need to melt into a balanced hemisphere wide agreement in the end.

Sub-regional schemes: If sub-regional agreements deepen cooperation in the region, then they are good for the FTAA. They can serve as a valuable tool to deal with "neighborhood" issues, like peace on the borders, that the FTAA would not include.

FTAA: Beyond Trade

Devlin noted the following positive externalities resulting from the FTAA process:

***Esprit de Corps*:** The FTAA countries are getting to know each other, which will help in the resolution of bilateral issues.

Improved data collection: The public has access to comparative data on laws, regulations, etc., as a result of the FTAA website and other information sources resulting from the FTAA talks.

Learning laboratory: The FTAA is a "laboratory" for some delegates to learn negotiating skills and trade disciplines.

Business facilitation: The FTAA established a number of business facilitation measures, which the countries are working to implement.

Private sector participation: The Americas Business Forum *(Please see W&C November 2002 Report)* creates a hemispheric business community.

Trade development strategy: The FTAA process helps link trade with development issues.

Effect on the multilateral system: The FTAA process has resulted in the following, which will also affect the WTO negotiations: i) the FTAA countries have submitted the necessary data to the WTO; ii) the 34 countries together provide greater negotiating leverage at the WTO than negotiating individually; iii) the level of transparency is increasing, as demonstrated by the release of the second draft text; iv) the countries have formed coalitions on some issues, for example export subsidies, to communicate their positions in the WTO; and v) there has been active participation of civil society groups.

Capacity building: The Hemispheric Cooperation Program is one example of, if successful, how countries can coordinate capacity building efforts. Previously, capacity building efforts among the Latin American countries were carried out in an uncoordinated fashion.

Cooperation of hemispheric agencies: The hemispheric organizations are working seamlessly together, unlike in the past. For example, the Inter American Development Bank and the Economic Commission for Latin America and the Caribbean have been working closely together.

III. Private Sector Representatives Discuss Timing and U.S. Private Sector Support

The following panel discussed the changes resulting from the FTAA:

- Alex Chafuen, Atlas Economic Research Foundation
- Bill Lane, Caterpillar Company
- Jon Huenemann, FH/GPC—A Fleishman-Hillard Company

Timing

Regarding the timing, Chafuen noted that a "Plan B" exists if the 2005 deadline is not met—that is to negotiate bilateral FTAs. However, Chafuen expressed his hope that the 2005 deadline is met.

WTO is the "Grand Prize"; FTAA is More Difficult

Lane commented on the ongoing U.S. bilateral, regional, and multilateral negotiations from a private company's perspective. We highlight his remarks below:

- All the current bilateral and regional agreements combined add up to a relatively modest amount of trade. Therefore, they are all "doable."
- Doha is the "grand prize" in the trade negotiations. The Doha Round involves lowering, not eliminating, trade barriers. Most of the concessions likely will be back loaded, meaning that the real benefits will not materialize until the latter part of the phase out period.
- The FTAA involves the elimination of trade barriers. Therefore, the FTAA is commercially significant.
- The FTAA is the toughest current trade negotiation, but probably will be the most beneficial.

Regarding a question on whether private sector involvement in the FTAA is strong, Lanes responded that the involvement is not as strong as in previous negotiations. For example, the pharmaceutical industry, the high-tech industry and the banking industry all have been more active in previous negotiations. The driving private sector support seems to be coming from the Dow companies, such as Proctor & Gamble, Kodak, Boeing, etc. Hopefully, though, the substance of the U.S.-Chile FTA will generate more interest in an FTAA.

US Approaching "Day of Reckoning" on Agriculture

Huenemann, a former USTR negotiator, commented on the following:

- The FTAA is the most difficult set of negotiations in which the US currently is involved.

- Zoellick has "stuck to his word" on advancing the Administration's policy of competitive liberalization. The US will continue with the hemispheric trade liberalization approach, but if the FTAA stalls or fails, then the US will continue to negotiate bilaterally.
- Huenemann expects the US and Brazil to find a way to make the FTAA work.
- Brazil needs to define its relationship with Mercosur, which will be tested by the FTAA.
- The U.S.-Central America FTA effectively is a "done deal." The question is how the U.S.-Central America FTA will fit into the FTAA.
- The Doha negotiations are important to the FTAA process. The US is coming to a "day of reckoning" on agriculture. Previously, the sugar lobby, for example, was organized and politically strong and there was no real counterweight. Now there are groups interested in opening certain sectors, like the sugar sector, so that Brazil and other countries will liberalize their markets. These counterweights to the traditional lobbies likely will change the congressional dynamics as more lobbyists rise in support of liberalizing agriculture. Essentially, the debate will be decided by the relationship between the Members of Congress and their domestic constituents.

Huenemann qualified his statement by indicating that one must assume first that the premise of the negotiations is to "go to zero", which is the official U.S. position.

IV. Mexico Views FTAA as "Future Reality"

Hector Marquez, Trade and NAFTA Office, said that the FTAA will:

- Develop a set of rules, which is important for investor confidence.
- Force Mexico to be competitive in the hemisphere. The hemisphere as a whole needs to be prepared to face competition from other countries, especially Eastern Europe and Asia.

When asked if Mexico aims to prohibit other countries from "sharing" the benefits it receives under NAFTA, Marquez said that Mexico sees the FTAA as future reality. He added that the worse case scenario would be if countries in the hemisphere keep their markets closed so they can compete for access to the U.S. market.

Mexico has much to gain from an FTAA because it can source from other countries within the hemisphere. Mexico already is facing competition from China and other countries. Mexico is not afraid of more competition. More competition will lead to development in other Mexican sectors.

V. FTAA "Too Important to Fail"

Eric Farnsworth, Manatt Jones Global Strategies, discussed the change in political power in Brazil. Lula wants to take time to review the FTAA, but not necessarily stop the process. Lula wants to ensure that the FTAA is in Brazil's best interest *(Please see W&C October 2002 Report).* He likened Lula's strategy to Clinton assuming office and wanting to review NAFTA.

Farnsworth stated that the FTAA is "too important to fail." There is "nothing else on the table." In addition, the U.S. government has concluded that economic expansion underwrites political and social stability.

However, the U.S.-Brazil relationship is the "great unknown." Leadership will be a key element in the FTAA process.

Farnsworth stressed that there can be no meaningful FTAA without Brazil. Note that Brazil is the largest economy in Latin America and has a broad and diverse industrial structure, unlike some countries in the rest of region. He believes there will be an FTAA by 2005, but questions what form the FTAA will take.

OUTLOOK

Strong political leadership from the two hemispheric heavyweights, the US and Brazil, undoubtedly would energize the FTAA process. Analysts will be watching closely how the relationship evolves.

Many analysts emphasize that neither the US nor Brazil as co-chairs of the process wants to be responsible for the failure of the FTAA. A pessimistic scenario would be one in which the FTAA failed and the US and Brazil blamed each other for the failure. A more likely scenario, it seems, is that agriculture discussions at the WTO-level will complicate FTAA negotiations, which could slow down the process or result in a scaled back agreement. However, FTAA supporters insist that all indications from the Quito Ministerial signal that the FTAA countries are committed to negotiating an ambitious agreement by the 2005 deadline.

In the short term, negotiators will strive to meet the deadlines approved in Quito. Initial offers for agricultural and nonagricultural products, services, investment, and government procurement are to be made between December 15, 2002, and February 15, 2003. Requests for improvements in offers are to be made between February 16, and June 15, 2003. The deadline for the initiation of the process of exchanging revised offers is July 15, 2003.

Discussion of US-Taiwan FTA Prospects

SUMMARY

The New America Foundation sponsored a discussion on November 22, 2002 on the prospects for a free trade agreement ("FTA") between the US and Taiwan. Chief International Trade Counsel of the Senate Finance Committee Greg Mastel commented favorably on the prospects of an FTA with Taiwan, and about FTAs as generally a more effective and timely approach at trade liberalization than WTO negotiations. Audience participants, however, were generally more skeptical and cited economic and political reasons why an FTA would not be launched in the near future. Mastel requested that his remarks (which are somewhat controversial) be considered **off-the-record**.

ANALYSIS

I. US Shifts Towards FTA vs. WTO Negotiations

Mastel began by describing the WTO negotiating process as increasingly slow and more difficult to move forward. He cited recent setbacks over agriculture liberalization as evidence of the limits of the WTO. He added that the multilateral framework is unable to address all trade issues. Rather, he believes that bilateral trade agreements or FTAs could be more appropriate for certain trading partners. He noted that the US lags behind many countries in terms of FTAs, and only has three FTAs with Israel, Jordan and NAFTA.

II. U.S. Selection of FTA Partners

Mastel explained that there are many countries in line that want to start FTA negotiations with the US. But, the US has limited negotiating resources and must choose carefully. According to Mastel, the decision whether to initiate an FTA depends on how US and a potential FTA partner can benefit from an agreement.

Among potential FTA partners, Mastel believes that Taiwan is at the top of the list. He noted that Taiwan is a major U.S. trading partner in Asia. It has a rapidly growing economy, and its agriculture and services industries have great potential to expand. For U.S. exporters, the possibility of growth in exports to Taiwan is certain. In addition, Taiwan has made a major transition to a democratic government and solid institutions to expand trade. Nevertheless, there are some problems in Taiwan, such as protection of intellectual property rights.

III. Reasons Delaying the Launch of a US-Taiwan FTA

Mastel explained that the primary reason the US has not initiated an FTA with Taiwan is because of China. He noted that for historical reasons, any expanded relationship between the US and Taiwan is a sensitive issue and could provoke a severe reaction from China. Nevertheless, he believes times are changing and the Shanghai communiqué is no longer an appropriate approach for all countries concerned. China and Taiwan are far different from what they were 20-30 years ago. For example, both countries have joined the WTO in the past year.

Mastel asserted that an FTA with Taiwan is not a substantial departure from U.S. foreign policy vis-à-vis the two "Chinas". Thus, he believes that it is no longer proper to politicize an FTA between the US and Taiwan. In addition, he believes that Congress will look more favorably towards an FTA with Taiwan. Finally, he said he was confident about the prospects for an FTA with Taiwan.

OUTLOOK

Mastel's sanguine prospects for an FTA between the US and Taiwan are not universally shared, and remain a controversial idea for both political and economic reasons.

Audience participants expressed mixed views toward a potential US-Taiwan FTA. A Japanese participant believes it would be a positive development, and agreed with Mastel that should not be a legal basis for preventing the launch of negotiations. However, she added that Taiwan should refrain from declaring itself an independent nation whenever it had the chance, including through FTA negotiations. Instead, Taiwan should concentrate on promoting its economic development with less political overtones. Another audience participant cited that the US has a large trade deficit with Taiwan, and an FTA would not necessarily improve the situation.

Although China and Taiwan are now both in the WTO, China would probably object to an FTA with the US, arguing that an FTA would provide Taiwan more recognition as an independent state. Still, pro-Taiwan Members of Congress would desire to initiate an FTA despite Chinese objections.

WTO's Committee on Regional Trade Agreements Issues 2002 Draft Report

SUMMARY

The WTO's Committee on Regional Trade Agreements has issued the 2002 Draft Report of its activities to the General Council. Despite the fact that the Committee has completed the factual examination of most of the active and notified regional trade agreements ("RTAs"), the persistent lack of consensus among Members has blocked the adoption of a final decision on the WTO-compliant status of relevant RTAs.

The Committee's report confirms, once again, the need to clarify and improve the current disciplines and procedures applying to RTAs. Negotiations are taking place on this issue as part of the Doha Round, but with little progress to date. The European Community, as one of the most active Members concluding RTAs, is expected to play a key role in the on-going negotiations.

ANALYSIS

On November 4, 2002, the WTO's Committee on Regional Trade Agreements ("CRTA") issued a draft report ("2002 Draft Report") of its activities to the General Council.[45] Most CRTA discussions encompass RTAs between the EC and the EFTA. For instance, the EC-Enlargement, EC-Bulgaria, EC-Israel, EFTA-Bulgaria, EFTA-Israel, EFTA-Morocco and EFTA-Poland RTAs are currently under examination. The mandate of the CRTA is unfulfilled due to the lack of final WTO-compliant status of relevant RTAs.

Total number of RTAs notified to the WTO/GATT[46]	**255**
Number of RTAs under examination by the CRTA	**125**, of which: **102** – referred to the CRTA by the Council on Trade in Goods **22** – referred to the CRTA by the Council on Trade in Services **1** – referred to the CRTA by the Council on Trade and Development

Despite the fact that the CRA has completed the factual examinations of over 70 of the active and notified RTAs (i.e. customs unions or free trade areas), the CRTA is "persistently deadlocked"[47] when it comes to finalizing the status of each RTA examined. The 2002 Draft Report highlights this paralysis by stating that: "No progress was made, however, on the

[45] Draft Report (2002) of the CRTA to the General Council, WT/REG/W/47, 4 November 2002

[46] This number includes the notification of new RTAs, and the expansion of previously notified RTAs.

[47] Report (2001) of the CRTA to the General Council, WT/REG/10, 10 October 2001

completion of the examination reports."[48] It is worth noting that all RTAs notified to the WTO must be subject to an examination process to verify whether they are consistent with the provisions of Article XXIV of GATT 1994.

The Ministerial Declaration at the Doha Ministerial Meeting of November 2001 called for "…negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements."[49] In particular, some Members are concerned that RTAs may not comply with GATT Article XXIV:2 requirement, which provides that RTAs must cover "a substantial part of the trade…" between the relevant parties.

Countries such as Japan and Hong Kong have called for a strict interpretation of the 'substantial part of trade' clause, to prevent countries from undermining the WTO's Most-Favoured Nation principle by excluding sectors from RTAs. The EC, in sharp contrast, is not enthusiastic about a detailed clarification of the disciplines because it wants to retain the greatest flexibility possible for its existing and future membership to RTAs. In a formal proposal, Australia suggested preventing Members from joining or creating RTAs which exclude large portions of trade flow – going so far as to suggest a formula for calculating an RTA's compliance with the 'substantially all' trade clause. The EC's proposal, on the other hand, considers its agreements with various developing countries to be a preface to an RTA, and hence not unilateral tariff preferences. The EC's interpretation hinges on allowing developing countries the flexibility to take on lesser commitments under RTAs.

The 2002 Draft Report ends by touching on the systemic effects of the proliferation of bilateral and regional agreements in recent years. The increase of these agreements translates to more countries being left out of various combinations of preferential deals – and hence more incentive to make the WTO disciplines on RTAs.

OUTLOOK

In the Negotiating Group on Rules, Members continue to develop the rules and work programme on regional trade. The US prefers, for instance, to 'grandfather' existing regional trade deals to insulate them from any new rules or clarifications agreed upon in the Doha Round of negotiations.

The Doha Mandate does not establish an interim deadline for the completion of negotiations regarding the provisions applying to regional trade agreements. Results on this issue should not be expected during the first phase of the Doha Round (i.e. not before the next Ministerial meeting in September 2003).

[48] Draft Report (2002) of the CRTA to the General Council, WT/REG/W/47, 4 November 2002

[49] Ministerial Declaration WT/MIN(01)/DEC/1, Adopted 14 November 2002, para. 29